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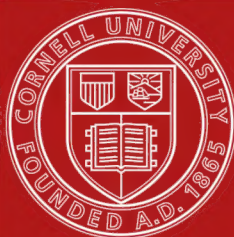
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A DIGEST
OF
STATUTES, EQUITY RULES, AND
DECISIONS,
UPON THE
JURISDICTION, PLEADINGS, AND PRACTICE
OF THE
CIRCUIT COURTS OF THE UNITED STATES;
INCLUDING
DECISIONS RELATING TO PLEADINGS AND PRACTICE AT
COMMON LAW, IN EQUITY, APPEALS IN ADMIRALTY,
AND IN CRIMINAL CASES.
BY
ERASTUS THATCHER,
AUTHOR OF
"A DIGEST OF STATUTES, RULES, AND DECISIONS RELATIVE TO THE JURISDICTION
AND PRACTICE OF THE SUPREME COURT OF THE UNITED STATES."

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PREFACE.

THIS Digest contains the decisions upon the jurisdiction, pleadings, and practice of the Circuit Courts of the United States, found in the Reports, as follows: Reports of the Supreme Court from the second of Dallas to the thirteenth of Otto, inclusive, being one hundred and two volumes; and all the Reports of the Circuit Courts for the nine circuits, being ninety-eight volumes,—making the whole number of Reports two hundred volumes.

Decisions upon jurisdiction are arranged under the sections and subdivisions of the Revised Statutes which confer jurisdiction, original and appellate, upon the Circuit Courts; decisions upon pleadings at law, civil and criminal, under the proper heads of such pleadings; and decisions upon common-law practice and practice on appeal in admiralty, in like manner. The decisions upon equity pleadings and practice are arranged under the Equity Rules.

The arrangement is in chronological order, except that the decisions of the Circuit Courts are placed after those of the Supreme Court, and in order according to the numbers of the circuits, from the First to the Ninth Circuit.

Early decisions of the several courts are included, although some few of them may be of but little present

value, because of subsequent legislation of Congress, or because, in rare instances, they have been overruled or modified by recent adjudications.

Since the act of Congress of June 1, 1872 (17 Stat. page 197, sec. 5), the practice, pleadings, and forms, &c., in other than equity and admiralty causes, in the Circuit and District Courts of the United States, must conform as near as may be to the practice, pleadings, and forms, &c., in the courts of record of the state within which such Circuit or District Courts are held. Under several state codes a "complaint" is substituted for a declaration, and an "answer" takes the place of a plea. In such cases it has been deemed proper to arrange the decisions upon complaints and answers, with those relating to declarations and pleas.

Adjudications relating to evidence, costs, and to some other subjects are included herein, only where they have a bearing upon matters of practice.

ERASTUS THATCHER.

WASHINGTON, D. C., March 1, 1883.

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 THE CIRCUITS AS ORIGINALLY ORGANIZED WERE AS FOLLOWS:—

1. Massachusetts, Maine, New Hampshire, and Rhode Island; 2. New York, Connecticut, and Vermont; 3. Pennsylvania and New Jersey; 4. Virginia, Maryland, and Delaware; 5. Alabama and Louisiana; 6. North Carolina,

South Carolina, and Georgia; 7. Ohio, Indiana, Illinois, and Michigan; 8. Kentucky, Tennessee, and Missouri; 9. Mississippi and Arkansas.

AS REORGANIZED BY ACT OF JULY 23, 1866:—

1 and 2 remain the same; 3. Pennsylvania, New Jersey, and Delaware; 4. Maryland, Virginia, West Virginia, North Carolina, and South Carolina; 5. Alabama, Louisiana, Florida, Georgia, Mississippi, and Texas; 6. Ohio, Michigan, Kentucky, and Tennessee; 7. Indiana, Illinois, and Wisconsin; 8. Minnesota, Iowa, Missouri, Kansas, and Arkansas; 9. California, Oregon, and Nevada.

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A DIGEST
OF
STATUTES, EQUITY RULES, AND DECISIONS.

A DIGEST
OF
STATUTES, EQUITY RULES, AND DECISIONS,
UPON THE
JURISDICTION, PLEADINGS, AND PRACTICE OF THE
CIRCUIT COURTS OF THE UNITED STATES.

Jurisdiction of Circuit Courts.

*Matter in Dispute. Aliens. Citizens of Different States. Assignee of
Chose in Action.*

REVISED STATUTES.

SEC. 629. The Circuit Courts shall have original jurisdiction as follows:—

First. Of all suits of a civil nature at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the state where it is brought and a citizen of another state: *Provided*, That no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.

24 Sept., 1789, c. 20, s. 11, v. 1, p. 78.

3 March, 1875, c. 137, ss. 1-3, v. 18, pp. 470-473.

Suits in Equity by the United States.

Second. Of all suits in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners.

24 Sept., 1789, c. 20, s. 11, v. 1, p. 78.

Suits at Common Law, by the United States, or Officers.

Third. Of all suits at common law where the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs.

24 Sept., 1789, c. 20, ss. 9, 11, v. 1, pp. 76, 78.

3 March, 1815, c. 101, s. 4, v. 3, p. 245.

Suits under Import, Internal Revenue, and Postal Laws.

Fourth. Of all suits at law or in equity, arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; of all causes arising under any law providing internal revenue, and of all causes arising under the postal laws.

Imports, 2 March, 1833, c. 57, s. 2, v. 4, p. 632.

24 Sept., 1789, c. 20, s. 9, v. 1, p. 76.

Internal revenue, 13 July, 1866, c. 184, ss. 9, 19, v. 14, pp. 111, 145, 152.

2 March, 1867, c. 169, ss. 10, 25, v. 14, pp. 475, 483.

20 July, 1868, c. 186, s. 106, v. 15, p. 167.

30 June, 1864, c. 173, ss. 41, 179, v. 13, pp. 239, 240, 305.

3 March, 1865, c. 78, s. 1, v. 13, p. 483.

Postal laws, 3 March, 1845, c. 43, s. 20, v. 5, p. 739.

Suits for the Enforcement of Penalties.

Fifth. Of all suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage of passengers in merchant vessels. [See s. 4270.]

3 March, 1855, c. 213, s. 15, v. 10, p. 720.

Condemnation of Property used for Insurrectionary Purposes.

Sixth. Of all proceedings for the condemnation of property taken as prize, in pursuance of section fifty-three hundred and eight, title "INSURRECTION." [See ss. 5308, 5309.]

6 Aug., 1861, c. 60, s. 2, v. 12, p. 319.

Suits under Slave-trade Laws.

Seventh. Of all suits arising under any law relating to the slave-trade.

- 22 March, 1794, c. 11, s. 1, v. 1, p. 347.
- 10 May, 1800, c. 51, ss. 1, 5, v. 2, pp. 70, 71.
- 2 March, 1807, c. 22, s. 7, v. 2, p. 28.
- 20 April, 1818, c. 91, ss. 1, 2, 4, 7, v. 3, pp. 450-452.
- 3 March, 1819, c. 101, s. 1, v. 3, p. 532.

Suits on Debentures.

Eighth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture. [See s. 3039.]

- 2 March, 1799, c. 22, s. 80, v. 1, pp. 687, 688.

Patent and Copyright Suits.

Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States.

- 8 July, 1870, c. 230, ss. 55, 106, v. 16, pp. 206, 215.
- 16 Feb., 1875, c. 77, s. 2, v. 18, p. 314.

Suits against National Banks.

Tenth. Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.

- 3 June, 1864, c. 106, s. 57, v. 13, p. 116.

Suits to enjoin the Comptroller of the Currency.

Eleventh. Of all suits brought by [*or against*] any banking association established in the district for which the court is held, under the provisions of title "THE NATIONAL BANKS," to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. [See s. 5237.]

- 3 June, 1864, c. 106, ss. 50, 57, v. 13, pp. 115, 116.
- 18 Feb., 1875, c. 80, v. 18, p. 318.

Suits for Injuries on Account of Acts done under Laws of the United States.

Twelfth. Of all suits brought by any person to recover damages for any injury to his person or property, on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several states.

2 March, 1833, c. 57, s. 2, v. 4, p. 632.

13 July, 1866, c. 184, s. 67, v. 14, p. 171.

28 Feb., 1871, c. 99, s. 15, v. 16, p. 438.

31 May, 1870, c. 114, v. 16, p. 140.

Suits to recover Offices.

Thirteenth. Of all suits to recover possession of any office, except that of elector of President or Vice-President, Representative or Delegate in Congress, or member of a state legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guarantied by the Constitution of the United States, and secured by any law to enforce the right of citizens of the United States to vote in all the states. [See s. 2010.]

31 May, 1870, c. 114, s. 23, v. 16, p. 146.

Suits for Removal of Officers holding contrary to Fourteenth Amendment.

Fourteenth. Of all proceedings by the writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress or of a state legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States. [See s. 1786.]

31 May, 1870, c. 114, s. 14, v. 16, p. 143.

28 Feb., 1871, c. 99, s. 15, v. 16, p. 438.

Suits for Penalties under Laws to enforce Elective Franchise.

Fifteenth. Of all suits to recover pecuniary forfeitures under any act to enforce the right of citizens of the United States to vote in the several states.

31 May, 1870, c. 114, ss. 2-4, 8, v. 16, pp. 140-142.

28 Feb., 1871, c. 99, s. 15, v. 16, p. 438.

United States v. Reese, 92 U. S. 214.

United States v. Cruikshank, 92 U. S. 542.

*Suits to redress Deprivation of Rights secured by the Constitution and
Laws to Persons within Jurisdiction of United States.*

Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States. [See ss. 977, 1979.]

20 April, 1871, c. 22, s. 1, v. 17, p. 13.

31 May, 1870, c. 114, ss. 16, 18, v. 16, p. 114.

9 April, 1866, c. 31, s. 3, v. 14, p. 27.

Suits on Account of Injuries by Conspirators in Certain Cases.

Seventeenth. Of all suits authorized by law to be brought by any person on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, title "CIVIL RIGHTS."

20 April, 1871, c. 22, s. 2, v. 17, p. 13.

1 March, 1875, c. 114, s. 3, v. 18, p. 336.

Suits against Persons having Knowledge of Conspiracy, &c.

Eighteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, are about to be done, and, having power to prevent or aid in preventing the same, neglects or

refuses so to do, to recover damages for any such wrongful act. [See s. 1981.]

20 April, 1871, c. 22, s. 6, v. 17, p. 15.

22 Feb., 1875, c. 95, s. 4, v. 18, p. 333.

Suits against Officers and Owners of Vessels.

Nineteenth. Of all suits and proceedings arising under section fifty-three hundred and forty-four, title "CRIMES," for the punishment of officers and owners of vessels, through whose negligence or misconduct the life of any person is destroyed.

28 Feb., 1871, c. 100, s. 57, v. 16, p. 456.

Crimes and Offenses.

Twentieth. Exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the District Courts of crimes and offenses cognizable therein.

24 Sept., 1789, c. 20, s. 11, v. 1, p. 78.

19 Feb., 1875, c. 90, s. 7, v. 18, p. 331.

ACT OF MARCH 3, 1875, 18 STAT. AT LARGE, 470.

SEC. 1. The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects ;

And shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offenses cognizable therein.

But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court.

And no civil suit shall be brought before either of said courts against

any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided ;

Nor shall any Circuit or District Court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange.

And the Circuit Courts shall also have appellate jurisdiction from the District Courts under the regulations and restrictions prescribed by law. [*Supplement to Rev. Stat., page 173.*]

Jurisdiction, how conferred.

1. (Dec., 1851.) Chancery jurisdiction is conferred on the courts of the United States, by the Constitution, under certain limitations ; and under these limitations, the usages of the High Court of Chancery, in England, which have been adopted as rules by this court, furnish the chancery law which is exercised in all the states, and even in those where no state chancery system exists. *Pennsylvania v. Wheeling, &c. Bridge Co.*, 13 How. 519.

2. Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the Union. *Ib.*

3. (June, 1838.) Courts of limited jurisdiction can only exercise their powers in the cases and in the mode prescribed by the legislature. *Hart v. Gray*, 3 Sumn. 339.

4. (Oct., 1865.) The courts of the United States cannot exercise any equity powers, except such as are conferred by an act of Congress, and those judicial powers which the High Court of Chancery of England, under its judicial capacity as a court of equity, possessed and exercised at the time of the formation of the Constitution of the United States. *Loring v. Marsh*, 2 Cliff. 470.

5. Powers not judicial, exercised by the Chancellor, as the representative of the king's prerogative, are not possessed by the Circuit Courts. *Ib.*

6. The prerogative power belonging to the sovereign has not been delegated to the federal government, but remains in the

several states, to be exercised according to the laws and usages there prevailing. *Ib.*

7. (April, 1811.) The Circuit Courts are not inferior, in the technical sense of the books, but are so only as subordinate to the Supreme Court. But their jurisdiction is special and limited. *Livingston v. Van Ingen*, 1 Paine, 45.

8. If jurisdiction of "cases arising under the laws of the United States" be not conferred on the Circuit Courts by an act of Congress, they cannot take cognizance of them. *Ib.*

9. And where Congress has given an action at law, in the Circuit Courts, in certain cases, they do not thereby acquire jurisdiction so as to entertain, in those cases, a bill in equity not relating to an action at law. *Ib.*

10. But whether, if it should become necessary, in an action at law, in the Circuit Courts, to appeal to their equity side, in aid or defense of such action, those courts would have the necessary equity powers, *quære. Ib.*

11. (April, 1805.) The jurisdiction of the courts of the United States is limited; and the inferior courts can exercise it, only in cases in which it is conferred by an act of Congress. *Ex parte Cabrera*, 1 Wash. 232.

12. (Nov., 1811.) The jurisdiction of the courts of the United States depends exclusively on the Constitution and laws of the United States. *Livingston v. Jefferson*, 1 Brock. 203.

Jurisdiction. District in which Suit may be brought.

1. (Feb., 1810.) A suit in chancery by one who has the prior equity, against him who has the oldest patent, is in its nature local; and if it be a mere question of title, must be tried in the district where the land lies. *Massie v. Watts*, 6 Cranch, 148.

2. But if it be a case of *contract*, or *trust*, or *fraud*, it is to be tried in the district where the defendant may be found. *Ib.*

3. (Jan., 1837.) The residence of a party in another district of a state than that in which the suit is brought, in a court of the United States, does not exempt him from the jurisdiction of the court. The division of a state into two or more districts cannot affect the jurisdiction of the court on account of citizenship. If a party is found in the district in which he is sued, the case is out of the prohibition of the judiciary act, which declares that

“no civil suit shall be brought in the courts of the United States, against a defendant, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.” *McMicken v. Webb*, 11 Pet. 25.

4. (Dec., 1857.) By the Judiciary Act of 1789, no civil suit shall be brought against an inhabitant of the United States, by an original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. *Chaffee v. Hayward*, 20 How. 208.

5. This provision of law is not changed by any subsequent process act, or by the law giving jurisdiction to Circuit Courts in patent cases, without regard to citizenship. *Ib.*

6. Therefore, where a suit was commenced for an infringement of a patent-right, and process was served by attaching the property of an absent defendant, this was not sufficient to give the court jurisdiction. *Ib.*

✓ 7. (Dec., 1870.) By the Judiciary Act of 1789, in a case where jurisdiction of the Circuit Court depended on citizenship, every defendant must have resided, or been served with process, in the district where the suit was brought; but by the act of 1839 this is not necessary, — a non-resident defendant may either voluntarily appear, or, if not a necessary party, his appearance may be dispensed with. *Jones v. Andrews*, 10 Wall. 327.

8. Allegation of citizenship is sufficiently made when it appears fairly, and in such a way as to leave no room for reasonable doubt, from the bill or declaration, of what states the respective parties are citizens. *Ib.*

✓ 9. (Oct., 1880.) A right arising under, or a liability imposed by, either the common law or the statute of a state may, where the action is transitory, be asserted and enforced in any Circuit Court of the United States having jurisdiction of the subject-matter and the parties. *Dennick v. Railroad Co.*, 13 Otto, 11.

10. A. died in New Jersey from injuries there received, for which, if death had not ensued, B., the party inflicting them, would have been liable to an action for damages. The statute of that state (*infra*, p. 12) provides that such an action may be brought against the party by the personal representative of the deceased. C., appointed under the laws of New York administratrix of A., brought, in a court of the latter state, a suit against

B., which, by reason of the citizenship of the parties, was removed to the Circuit Court of the United States. *Held*, 1. That the suit can be maintained; the right of action not being limited by the statute to a personal representative of the deceased appointed in New Jersey and amenable to her jurisdiction. 2. That distribution of moneys recovered by C. from B. may be enforced by the courts of New York in the manner prescribed by that statute. *Ib.*

11. (Nov., 1847.) An injury to a party [half of the water by diversion] may be prosecuted personally in the state where the injury is done; or the injury to the mills, &c., may be prosecuted in the state where they are situated. *Stillman & Co. v. White Rock Mfg. Co.*, 3 Woodb. & M. 538.

12. (May, 1864.) Under the eleventh section of the Judiciary Act, when a party defendant is found in the district where the process issued, although not a resident thereof, he may lawfully be served with the process; but it cannot properly be said that he was found there, if he was inveigled or enticed into the district by false representations or deceitful contrivances, for the purpose of making such service upon him. *Union Sugar Refinery v. Mathiesson*, 2 Cliff. 304.

13. The general rule is, that a person illegally in custody at the suit of one party is not privileged from arrest at the suit of another, except there be proof of concert or collusion; but prior illegal arrest and subsequent detention will render the service illegal, and entitle the defendant to an unconditional discharge. *Ib.*

14. Courts of justice everywhere regard the employment of one legal process, as a means of detaining a party till a second can be served upon him, such an abuse of the process as to render the second service unavailing; but whether the defendant is also entitled upon an *ex parte* application to a discharge from the prior service as well, *quære*. *Ib.*

15. (June, 1850.) Where the alleged unlawful use of the machine [patent-right] was in Vermont, and the suit was brought in New York,—*Held*, that, for the purpose of restraining the use of the machine, it was only necessary for the court to have jurisdiction of the person of the defendant. *Wilson v. Sherman*, 1 Blatchf. 537.

16. This question was involved in the cases of *Simpson v. Wilson* (4 How. 709) and *Wilson v. Simpson* (9 How. 109). *Ib.*

17. But where it may be necessary to proceed directly against the machine itself, as in extreme cases of contumacy, or of fraudulent contrivance to evade an injunction, the proceedings must be instituted in the district in which the machine is located. *Ib.*

18. (Oct., 1850.) Although the Circuit Courts of the United States have jurisdiction of all cases, at law and in equity, arising under the patent laws, for infringements of patents, without regard to the citizenship of the parties, or the amount in controversy; yet, under sec. 11 of the Judiciary Act of 1789 (1 Stat. at Large, 78), in order to give jurisdiction the defendant must be an inhabitant of the district in which the suit is brought, or be found within it at the time of serving the original process, whatever may be the nature or character of that process. *Day v. India-Rubber Mfg. Co.*, 1 Blatchf. 628.

19. Where a manufacturing corporation, chartered by New Jersey, and having its place of business and manufactory in that state, had a store in New York conducted by its agents, where its goods were sold, and a suit was commenced against it in this court, by attaching its goods found in that store, and serving a summons on its president at New York; yet, *Held*, that the corporation was not an inhabitant of this district, or found within it at the time of serving the process; and that this court had no jurisdiction of the action. *Ib.*

20. A corporate body created by a sister state can have no corporate existence beyond the limits of the territory of that state. *Ib.*

21. This court would, under sec. 11 of the Judiciary Act of 1789, have no jurisdiction in suits against foreign corporations, even where the state practice of New York, if adopted by it, would authorize the institution of such suits, by attaching their goods within the jurisdiction of the court. *Ib.*

22. This court has not, heretofore, by any of its rules, adopted the practice of the state courts of New York, which provides for commencing suits against foreign corporations by attachment. *Ib.*

23. (May, 1855.) Where it appeared, on a motion to this court for an injunction to restrain the infringement of a patent, that the infringing articles were made and sold in Rhode Island, and that the defendant resided there, and carried on there the business of making and selling the articles, the injunction was refused, on the ground that the defendant was beyond the pro-

cess of injunction, that the issuing of it would be inoperative and useless, and that the proper place to file a bill for an injunction was in Rhode Island. *Goodyear v. Chaffee*, 3 Blatchf. 268.

24. (Sept., 1855.) Where A. diverted, in Connecticut, a stream of water which had its rise in Connecticut, and flowed into Massachusetts, so that it ceased to flow to B.'s mill, situated on the same stream in Massachusetts, — *Held*, that the Circuit Court of the United States for Connecticut had jurisdiction of an action by B. against A., for the damage caused by the diversion. *Foot v. Edwards*, 3 Blatchf. 310.

25. (Dec., 1857.) This court has, under the eleventh section of the Judiciary Act of 1789 (1 Stat. at Large, 78), no jurisdiction of a civil suit against a corporation created by the laws of another state, where the suit is commenced by the service of process within this district, upon an officer of the corporation. *Pomeroy v. N. Y. & N. H. Railroad Co.*, 4 Blatchf. 120.

26. The provisions of said eleventh section, which require that every civil suit brought against an inhabitant of the United States, must be brought in the district of which he is an inhabitant, or in which he is found at the time of serving the writ, cannot be altered or modified by any state law. *Ib.*

27. Therefore, a law of New York, in regard to a Connecticut corporation, declaring it liable to be sued by summons, in the same manner as corporations created by the laws of New York, and that the process might be served on an officer or agent of the corporation, cannot have the effect to give to this court jurisdiction of a suit against such corporation, by the service of process within this district, on an officer or agent of such corporation. *Ib.*

28. (April, 1868.) By reason of the provisions of the sixth section of the act of April 3, 1818 (3 Stat. at Large, 415), the Circuit Court for the Southern District of New York has no original jurisdiction of a suit in equity, founded on letters-patent, for infringements thereof which occurred within the Northern District of New York. *Hodge v. H. R. Railroad Co.*, 6 Blatchf. 85.

✓ 29. (Dec., 1872.) The first section of the act of May 4, 1858 (11 Stat. at Large, 272), which provides that a suit not of a local nature, brought in a district in a state containing more than one district, against a single defendant, shall be brought in the

district in which the defendant resides, does not apply to a case where the single defendant is a corporation created by such state. *Locomotive, &c. Co. v. Erie Railway Co.*, 10 Blatchf. 293.

30. (April, 1873.) Jurisdiction over a Connecticut corporation cannot be acquired by this court, by service of process on one of its officers, in this district [Southern District of New York]. *Decker v. N. Y. Belting & Packing Co.*, 11 Blatchf. 76.

31. (Jan., 1877.) A corporation which has appeared and answered generally in an action, cannot afterwards insist that this court never acquired jurisdiction over it because process was not served upon it in the district of which it was an inhabitant at the time of service. *Kelsey v. Pennsylvania Railroad Co.*, 14 Blatchf. 89.

32. (April, 1818.) The eleventh section of the Judiciary Act of Sept. 24, 1789, which relates to service of process, is not a denial of jurisdiction, but the grant of a privilege to the defendant not to be sued out of the state where he resides, unless he shall be served with process in the state where the suit is brought. But the defendant may waive that privilege by a voluntary appearance. Yet if he plead the fact of his not having been served with process within the state where the cause has been commenced, and the cause is set down for a hearing on this plea, on the equity side of the court, the docket entries showing a prior appearance by a solicitor of the court cannot be taken notice of. *Harrison v. Rowan*, Pet. C. C. 489.

33. An amendment was allowed after argument, by which the plaintiff was allowed to traverse the fact of such an appearance having been entered. *Ib.*

✓ 34. (Nov., 1811.) An action for a trespass committed on lands is a local action, and the United States Circuit Court for the District of Virginia cannot take cognizance of a trespass committed on lands lying within the United States, but beyond the limits of the district, although the trespasser be a resident of Virginia. *Livingston v. Jefferson*, 1 Brock. 203.

✓ 35. (March, 1878.) A foreign insurance company may sue as plaintiff in a United States court, regardless of any state law forbidding such foreign companies from resorting to United States courts. *Metropolitan Life Ins. Co. v. Harper*, 3 Hughes, 260.

✓ 36. (Nov., 1875.) Generally, after the dissolution of a partner-

ship, the partners must be sued in the parish of their domicile. *Goodrich v. Hunton*, 2 Woods, 137.

✓ 37. But notwithstanding the dissolution of a partnership, it still continues for the purpose of liquidation and partition of assets, and all the partners can be legally sued in the domicile of the firm, for such purposes. *Ib.*

38. (Dec., 1874.) A foreign corporation may be "found," in the sense in which that word is used in the Judiciary Act, in a state other than that by whose law it was created. *Knott v. Southern Life Ins. Co.*, 2 Woods, 479.

39. (Dec., 1857.) Under sect. 9 of the act of Congress of Feb. 10, 1855, "to divide the State of Ohio into two judicial districts," which provides "that suits, not of a local nature, shall be brought in the court of the district where the defendant resides; but if there be more than one defendant, and they reside in different districts, the plaintiff may sue in either," — *Held*, that a defendant is one who is a real, and not merely a nominal, party to the suit, and who has either directly or indirectly an interest adverse to the claim of the plaintiff, and may be in some way affected by the judgment or decree to be entered. *Sacketts Harbor Bank v. Barry*, 1 Bond, 154.

40. (May, 1853.) When a subject is essentially local, as trespass on real estate, &c., the action must be brought in the state where the injury was done. *Railroad Co. v. Railroad*, 5 McLean, 444.

41. (1873.) The act of May 4, 1858 (11 Stat. 272), prescribing the mode of procedure where there are several defendants residing in different districts of the same state, construed and applied. *Babbitt v. Burgess*, 2 Dill. 169.

42. (1873.) The provision in sect. 11 of the Judiciary Act of 1789, that no civil suit shall be brought by original process in the federal court in any other district than that of which the defendant is an inhabitant, or in which he shall be found at the time of serving the writ, is not repealed by the Bankrupt Act, nor by sec. 6 of the act of June 1, 1872, in respect to the attachment of property (17 Stat. 196). *Nazro v. Cragin*, 3 Dill. 474.

✓ 43. (1879.) Where a state contains more than one district, and the suit is not of a local nature, the defendant must be sued in the district in which he resides. If all of the defendants

in such a suit reside in the same district, suit must be brought therein. It is only when the defendants reside in different districts that suit may be brought in either district (Rev. Stat. sec. 740); and where the defendants, not residing in different districts, were sued in a district in which neither resided, and a writ of attachment was directed to another district, where the owner of the property thereon attached resided, the court, on motion, discharged the property from the writ. *Seidenbach v. Hollowell*, 5 Dill. 382.

Jurisdiction. Service of Process.

1. (Jan., 1838.) By the general provisions of the laws of the United States:—

(1.) The Circuit Courts can issue no process beyond the limits of their districts.

(2.) Independently of positive legislation, the process can only be served upon persons within the same districts.

(3.) The acts of Congress adopting the state process, adopt the form and modes of service only so far as the persons are rightfully within the reach of such process; and did not intend to enlarge the sphere of the jurisdiction of the Circuit Courts.

(4.) The right to attach property to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the Circuit Court, *in personam*; that is, where they are inhabitants, or found within the United States; and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here. *Toland v. Sprague*, 12 Pet. 300.

2. (Jan., 1840.) Service of process or notice is necessary to enable a court to exercise jurisdiction in a case; and if jurisdiction be taken in a case, in which there has been no process or notice, the proceeding is a nullity. But this is only where original jurisdiction is exercised, and not a decision of a collateral question, in a case where the parties are before the court. *Walden v. Craig*, 14 Pet. 147.

3. (Dec., 1852.) A statute of Mississippi directs that, where the defendant cannot be found, a writ of *capias ad respondendum* shall be served, by leaving a copy thereof with the wife of the defendant, or some free white person above the age of sixteen years, then and there being one of the family of the defendant,

and found at his usual place of abode, or leaving a copy thereof at some public place, at the dwelling-house or other known place of residence of such defendant, he being from home, and no such free white person being found there willing to receive the same. *Harris v. Hardeman*, 14 How. 334.

4. The Circuit Court of the United States adopted a rule that the *capias* should be served personally, or, if the defendant be not found, by leaving a copy thereof at his or her residence, or usual place of abode, at least twenty days before the return-day thereof. *Ib.*

5. The marshal made the following return to a writ of *capias*: "Executed on the defendant Hardeman, by leaving a true copy at his residence." *Ib.*

6. This service was neither in conformity with the statute nor the rule. *Ib.*

7. Therefore, when the court gave judgment, by default, against Hardeman, and an execution was issued, upon which a forthcoming bond was given, and another execution issued, and at a subsequent day the court quashed the proceedings, and set aside the judgment by default, this order was correct. *Ib.*

8. When the judgment by default was given, the court was not in a condition to exercise jurisdiction over the defendant, because there was no regular service of process, actual or constructive. *Ib.*

9. The cases upon this point examined. *Ib.*

10. (Oct., 1874.) Under the Process Act of California, enacting that, in a suit against a corporation, the summons may be served on "the president or other head of the corporation," service is properly made on the president of a board of trustees, by whom it is declared in the city charter that the city shall be "governed," and which president of the board of trustees, the charter further declares, shall be "general executive officer of the city government, head of the police, and general executive head of the city." *City of Sacramento v. Fowle*, 21 Wall. 119.

11. (Oct., 1876.) In a suit brought by a citizen of Louisiana, in the Circuit Court of the United States for the Eastern District of Arkansas, to enforce a lien on lands situate within that district, one of the defendants, a citizen of Tennessee, was served with process in Arkansas. *Held*, that, under the act of Feb. 28, 1839 (5 Stat. 321), such service brought him within the jurisdiction of the court. *Ober v. Gallagher*, 3 Otto, 199.

12. (Oct., 1877.) Every corporation has officers, who speak and act for it by authority of law ; and some one of them, either by an express statutory provision, or by the nature of their functions, is the proper person on whom the process or notice, which is necessary to bind it in a judicial proceeding, must be served. *Alexandria v. Fairfax*, 5 Otto, 774.

13. Where the proceeding to confiscate a debt of the corporation to an individual is, by reason of his absence beyond the jurisdiction, necessarily *in rem*, the service of the process or notice on the corporation, which is requisite to a valid seizure of the debt, should be made upon some one of the officers of the corporation, on whom a similar service would bind it in an ordinary suit against it. *Ib.*

14. By the Code of Virginia, such service, in case of a town or a city, may be made on the mayor, or, in his absence, on the president of the council or board of trustees, or, if both be absent, on an alderman or trustee. *Ib.*

15. Service on the auditor of Alexandria, without an appearance by the city or the creditor, did not give the court jurisdiction of the debt which the city owed the creditor ; and its decree condemning the debt to confiscation and sale is void. *Ib.*

16. (Oct., 1877.) A foreign insurance company was doing business in Pennsylvania, under a license granted pursuant to a statute, which, among other things, provided that the company should file a written stipulation, agreeing that process issued in any suit brought in any court of that Commonwealth having jurisdiction of the subject-matter, and served upon the agent specified by the company to receive service of process for it, should have the same effect as if personally served upon the company within the state. Suit was brought in the Circuit Court of the United States for the Eastern District of Pennsylvania, by a citizen of that state, against the company, and process served, in accordance with the state law, upon its agent so specified, who resided within the district. The service of the process was quashed, because the company was not an inhabitant of, or found within the district. *Held*, 1. That the Circuit Court has jurisdiction of the suit, and should proceed to hear and determine it. 2. That said court is a court of the Commonwealth within the intent of the statute. *Ex parte Schollenberger*, 6 Otto, 369.

17. (Oct., 1878). In ejectment for lands in Oregon, the defend-

ant claimed title under a sheriff's deed, pursuant to a sale of them under execution sued out upon a judgment by default, rendered in 1861, against A., in the state court. A certified transcript of the judgment record, consisting, as required by the statute, of a copy of the complaint and notice, with proof of service, and a copy of the judgment, was put in evidence. The statute also required that, in actions *in personam*, service should be made by the sheriff's delivering to the defendant personally, or, if he could not be found, to some white person of his family above the age of fourteen years, at his dwelling-house or usual place of abode, a copy of the complaint, and notice to answer. The suit against A. was for the recovery of money; and the sheriff's return showed that service was made "by delivering to the wife of A., a white woman over fourteen years of age, at the usual place of abode," a copy of the complaint and notice; but it contained no statement that A. could not be found. At the ensuing term, judgment was rendered against him, with a recital that the "defendant, although duly served with process, came not, but made default."

Held, (1.) That the court, by such service, acquired no jurisdiction over the person of A., and its judgment was void.

(2.) That such substituted service, if ever sufficient for the purpose of jurisdiction, can only be made where the condition upon which it is permissible is shown to exist.

(3.) That the inability of the sheriff to find A. was not to be inferred, but to be affirmatively stated in his return.

(4.) That the said recital is not evidence of due service, but must be read in connection with that part of the record which sets forth, as prescribed by statute, the proof of due service.

(5.) That such proof must prevail over the recital, as the latter, in the absence of an averment to the contrary, the record being complete, can only be considered as referring to the former. *Settlemier v. Sullivan*, 7 Otto, 444.

18. (Oct., 1878.) Process from a District Court of Idaho cannot be served upon a defendant on an Indian reservation in that territory. *Harkness v. Hyde*, 8 Otto, 476.

19. (Oct., 1880.) Where a suit is brought, not to enforce a claim or lien upon property, but to cancel a purely personal contract, the Circuit Court cannot acquire jurisdiction of the defendant unless he appear, or there be personal service of process upon him within the district. If he is an infant, the decree against

him is void on its face, the record showing affirmatively the non-service of process, although a guardian *ad litem* was appointed for him in his absence. *Insurance Co. v. Bangs*, 13 Otto, 435.

20. The necessity for such service on the infant is not obviated by the state statute requiring his general guardian "to appear for and represent his ward in all legal suits and proceedings, unless when another person is appointed for the purpose as guardian or next friend. *Ib.*

21. (Oct., 1846.) It is doubtful whether those can be regarded as parties who are not summoned, nor appearing, nor ask to be summoned, unless conditionally, if the court deem it proper. *Heriot v. Davis*, 2 Woodb. & M. 229.

22. (June, 1856.) Though a Circuit Court of the United States would have jurisdiction over a suit against an *inhabitant* of the district, if personal service were made on him, by leaving a copy of the writ at his last and usual place of abode, and under the same process a direct or foreign attachment was made, yet, if no personal service whatever was made, there is no jurisdiction in the case of an inhabitant, any more than of a non-resident. *Sadlier v. Fallon*, 2 Curt. C. C. 579.

23. (June, 1880.) The plaintiff was a citizen of Vermont, and the defendant was a New York corporation, lessee of a railroad in Vermont, and in possession of the road and running it there, under the lease. Under a statute of Vermont, it had appointed a person in Vermont upon whom service of every kind of process known to the laws of the state might at any time be made, such service on such person to be a legal service on the lessee. The writ in this suit was served on such agent, in Vermont, in the manner provided by the laws of Vermont. The defendant moved to dismiss the suit on the ground that jurisdiction of the defendant was not obtained by service. *Held*, that the motion must be denied. *Brownell v. Troy & Boston Railroad Co.*, 18 Blatchf. 243.

24. The defendant did not become a citizen of Vermont, and the service of the process in Vermont was good under said law of the state. *Ib.*

25. (Oct., 1848.) A suitor in this court residing without the circuit is privileged from the service of a summons. The case of *Blight's Executor v. Fisher & Ashley*,¹ decided by Judge Wash-

¹ Pet. C. C. 41.

ington, A. D. 1809, in which this privilege was limited to exemption from arrest, is here overruled. *Parker v. Hotchkiss*, 1 Wall. Jr. 369.

26. (June, 1853.) When the defendant against whom the judgment was entered had no notice, and that appears from the proceeding, the judgment is a nullity. *Farmers' Loan & Trust Co. v. McKinney*, 6 McLean, 1.

27. But where there was due notice, or an appearance of the defendant, no other error in the proceedings can make the judgment a nullity. *Ib.*

28. Any other error may be ground for a reversal of the judgment, but it is not void. *Ib.*

29. (June, 1866.) In a suit against a corporation, in the United States Circuit Court for the state, by a citizen of another state, service of process within the state upon a joint defendant, a citizen of a third state, gives the court jurisdiction over him. *Mowrey v. Railroad Co.*, 4 Biss. 79.

30. (April, 1860.) A non-resident defendant, coming within a state for the purpose of defending his suit, cannot be legally served with process in another suit, even though the prior suit be first discontinued. *Juneau Bank v. McSpedan*, 5 Biss. 64.

31. The court will order the service so made to be stricken out. *Ib.*

32. (July, 1870.) The acts of Congress confer no jurisdiction over a defendant who is served with process while temporarily in a district in which he does not reside. The defendant has the privilege of litigating in the federal court in the state of his residence. *Smith v. Tuttle*, 5 Biss. 159.

33. (Oct., 1880.) A party going into another state as a witness, or as a party under process of a court, to attend upon the trial of a cause, is exempt from process in such state while he is necessarily attending there in respect to such trial. *Brooks v. Farwell*, 1 McCrary, 133.

34. (Jan., 1881.) Where a person has been brought from another state by force, or has been induced to come into this state by fraud and deceit of another, for the purpose of procuring the service of a summons in a civil action, and personal service has been made under such circumstances, the service of process and return of the officer will be quashed, on proper plea, where the facts are undisputed. *Blair v. Turtle & Bull*, 1 McCrary, 372.

Jurisdiction. Service by Publication.

ACT OF MARCH 3, 1875.

SEC. 8. That when in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be ;

Or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks ;

And in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district ;

But said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district,

And when a part of said real or personal property against which such proceeding shall be taken shall be within another district, but within the same state, said suit may be brought in either district in said state :

Provided, however, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said Circuit Court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by

him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law. [*Supplement to Rev. Stat.*, page 176.]

1. (Aug., 1874.) There can be no personal judgment upon constructive or substituted service by publication against a non-resident of a state. Such constructive service is only a means of reaching property situated at the time within the state, or of affecting some interest therein, or determining the *status* of the plaintiff with respect to the non-resident party. *Galpin v. Page*, 3 Sawyer, 93.

2. When constructive or substituted service by publication in a personal action is authorized by statute in place of personal citation, the statute must be strictly pursued. *Ib.*

3. Classification of suits *in rem*, and service of process upon infants of tender years, considered. *Ib.*

4. (March, 1875.) The proof of service required by sec. 269 of the Oregon Code to be placed in the judgment roll, includes, in the case of service by publication, the affidavit and order for publication as well as the affidavit of the printer to the fact of publication. *Neff v. Pennoyer*, 3 Sawyer, 274.

5. In case of service by publication, the record must show that there was evidence presented to the court or judge who made the order for publication, by affidavit, sufficient to prove the ultimate facts which bring the case within secs. 55 and 56 of the Oregon Code allowing such service; and it is not enough that the affidavit repeats the mere language of the statute; it must state facts and circumstances sufficient to prove these ultimate facts. But when a judgment is attacked collaterally, it is sufficient if the evidence contained in the affidavits *tends* to prove such facts. *Ib.*

6. An averment in an affidavit for an order for publication, "that plaintiff has a just cause of action against defendant for a money demand on account," is a mere assertion of the fact of the existence of such cause of action, in the opinion of the affiant to that effect, but is no evidence of it, and is therefore insufficient to authorize such order. *Ib.*

7. A verified complaint, as to the facts stated therein, is an affidavit; and when it appears from the record that such a complaint containing evidence of a cause of action against the defend-

ant was on file at the time of allowing an order for publication, the court will presume that such complaint was used as evidence therefor. *Ib.*

8. Where an order allowing service of summons by publication, under secs. 55 and 56 of the Oregon Code, omits to direct that a copy of the complaint and summons be mailed to the defendant, addressd to his place of residence, it must appear from the affidavit that the plaintiff had used such reasonable diligence to ascertain such place of residence, and that it is unknown to him. *Ib.*

9. Section 69 of the Oregon Code having provided that, in case of publication of the summons, "the proof of service" shall be by "the affidavit of the printer or his foreman or his principal clerk," an affidavit to such a publication by one styling himself therein "editor" is not within the statute, and therefore no evidence of the facts contained in it. *Ib.*

10. An averment of due publication of a summons, in a judgment entry, which appears from the whole record to be untrue, or is not affirmatively supported by the facts contained in such record, is a nullity, and may be disregarded. *Ib.*

11. (April, 1877.) A person temporarily residing or sojourning at Honolulu, as United States Commissioner to the Hawaiian government, is a non-resident of the state, within the meaning of subd. 3 of sec. 30 of the Oregon Code of 1854, authorizing the service of summons by publication, in certain cases where the defendant is not a resident of the territory. *Collinson v. Teal*, 4 Sawyer, 241.

12. (Feb., 1867.) A statute authorizing a suit to be commenced against a non-resident, upon constructive service of summons by publication, is in derogation of the common law, and its provisions must be strictly pursued in order to sustain the judgment recovered. A failure to comply with any of its requirements will be fatal, unless cured by the voluntary appearance of the party. *Gray v. Larrimore*, 4 Sawyer, 639.

Jurisdiction once attached not divested.

1. (Feb., 1817.) The jurisdiction of the Circuit Court, having once vested between citizens of different states, cannot be divested by a change of domicile of one of the parties, and his

removal into the same state with the adverse party, *pendente lite*. *Morgan v. Morgan*, 2 Wheat. 290.

2. (Feb., 1824.) In all cases of concurrent jurisdiction, the court which first has possession of the subject must determine it conclusively. *Smith v. M'Iver*, 9 Wheat. 532.

3. (Jan., 1834.) Of the action at law, the Circuit Court had jurisdiction, and no change in the residence or condition of the parties can take away a jurisdiction which has once attached. *Dunn v. Clarke*, 8 Pet. 1.

4. (Jan., 1838.) If, after the proper commencement of a suit in the Circuit Court, the plaintiff removes into, and becomes a citizen of, the same state with the defendant, the jurisdiction of the Circuit Court over the cause is not affected by such change of domicile. The cases of *Morgan's Heirs v. Morgan*, 2 Wheat. 290, 4 Cond. Rep. 320; and *Mollan v. Torrance*, 9 Wheat. 537, 5 Cond. Rep. 666; and *Dunn v. Clarke*, 8 Pet. 1, — cited. *Clarke v. Mathewson*, 12 Pet. 164.

5. (Dec., 1865.) The rule that among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some limitations; and is confined to suits between the same parties or privies seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought; and does not extend to all matters which may by possibility become invoked in it. *Buck v. Colbath*, 3 Wall. 335.

6. (Dec., 1869.) In which the first two points adjudged in the preceding case, and the points adjudged in *Insurance Company v. Ritchie* (5 Wall. 541), are affirmed; including the point adjudged in this last case, to wit, that where jurisdiction depends wholly on a statute, suits brought during the existence of the statute fall with its repeal. *The Assessors v. Osbornes*, 9 Wall. 567.

7. (Oct., 1876.) A court which has acquired rightful jurisdiction of the parties and subject-matter will retain it for all purposes within the general scope of the equities to be enforced. *Ober v. Gallagher*, 3 Otto, 199.

8. The holder of a note which is secured by mortgage may proceed at law and in equity at the same time, until he obtains actual satisfaction of the debt. *Id.*

9. (Oct., 1880.) A court which has once rightfully obtained jurisdiction of the parties may retain it until complete relief is afforded within the general scope of the subject-matter of the suit. *Ward v. Todd*, 13 Otto, 327.

10. (June, 1852.) When two courts have concurrent jurisdiction, the one which first has possession of the subject must adjudicate; and neither of the parties can be forced into another court. *Mallett v. Dexter*, 1 Curt. C. C. 178.

11. (May, 1849.) Jurisdiction of such an action [where the cause of action survives] having once vested in this court, the fact that the administrator of the deceased plaintiff is a citizen of Vermont, and resides in the same State with the defendant, will not divest the court of jurisdiction, in case the administrator be admitted to prosecute. *Hatfield v. Bushnell*, 1 Blatchf. 393.

12. (Oct., 1863.) Where the jurisdiction of courts over a subject-matter is concurrent, that tribunal which is first in possession of jurisdiction exercises it, to the exclusion of all others. *Parsons v. Lyman*, 5 Blatchf. 170.

13. (May, 1836.) Where the jurisdiction of the federal courts has once attached, no subsequent change in the relation or condition of the parties, in the progress of the cause, will oust that jurisdiction. The strongest considerations of utility and convenience require, that the jurisdiction being once vested, the action of the court should not be limited, but that it should proceed to make a final disposition of the subject. *United States v. Myers*, 2 Brock. 516.

14. Where the jurisdiction depends upon the party, it is the party on the record. *Ib.*

15. (Dec., 1860.) Where there is concurrent jurisdiction in courts, the tribunal first obtaining jurisdiction of the subject or person shall retain it. *Crane v. McCoy*, 1 Bond, 422.

16. (Nov., 1861.) Where a question of jurisdiction arises, as between a court of the United States and a state court, the court which first acquires possession of the fund or subject of the action, or jurisdiction over the matter by process against the person, has exclusive jurisdiction. *Burt v. Keyes*, 1 Flipp. 61.

17. (Oct., 1839.) A suit having been commenced in the Circuit Court of the United States, is not abated by a subsequent suit in the state court, by attachment against the defendant in the first

suit, who is summoned as garnishee. *Campbell v. Emerson*, 2 McLean, 30.

18. Jurisdiction having vested in the Circuit Court, it cannot be divested by any subsequent proceeding in a state court. *Ib.*

19. (April, 1855.) Where concurrent jurisdiction may be exercised by the federal and state courts, the court which first takes jurisdiction can be interfered with by no other court, state or federal. It is a subversion of the judicial power to take a case from a court having jurisdiction, before its final decision is given. *Ex parte Robinson*, 6 McLean, 355.

20. (Dec., 1858.) Priority of jurisdiction as between the state and the United States courts is determined by the service of process, and not by the date of the commencement of the suit. *Bell v. Ohio Life & Trust Co.*, 1 Biss. 260.

21. Where process has been served and an injunction issued in this court, jurisdiction attaches to the exclusion of a state court in which a suit had been previously commenced, but no process served. *Ib.*

22. (May, 1865.) A receiver cannot be called on to account before any court but that which appointed him. *Conkling v. Butler*, 4 Biss. 22.

23. Where a state court, on a petition under the Indiana statutes, to dissolve a corporation, has taken jurisdiction, thereby decreed a dissolution of the corporation, appointed a receiver, and taken the custody of the assets, no national court can take jurisdiction of a bill to call on the receiver to render an account, and to collect the assets under the direction of the United States court. *Ib.*

24. (July, 1869.) It is a general rule that, when different courts have concurrent jurisdiction of a matter, the first that takes the jurisdiction excludes the others. But to this rule there are exceptions. *Putnam v. City of New Albany*, 4 Biss. 365.

25. When a party has obtained a judgment in a state court against a corporation, on account of whose insolvency he is unable to collect the same, he may file his bill in equity in a national court, to oblige the debtors of the corporation to pay the judgment, if the citizenship of the parties to the bill will confer the jurisdiction according to the provisions of the Judiciary Act. *Ib.*

26. (Feb., 1875.) The court which first takes jurisdiction of a controversy and the parties, is entitled to retain it to its final

termination, and also to take possession of the *res*, subject of the controversy, exclusive of all interference from any other court of concurrent jurisdiction; and it is not essential that the court first taking jurisdiction of the controversy should also first take the actual possession of the *res*. *Gaylord v. Railroad Co.*, 6 Biss. 286.

27. If a receiver appointed by another court, on bill filed pending this controversy, takes prior possession of the *res*, his possession is wrongful, and should give way to the prior jurisdiction of this court. *Ib.*

28. (April, 1855.) If jurisdiction has once attached, it cannot be divested or impaired by matters occurring subsequently. *Greenwood v. Rector*, Hempst. 708.

29. (April, 1855.) Where the jurisdiction has once attached, it is not divested by subsequent changes or events. *Trigg v. Conway*, Hempst. 711.

Jurisdiction at Law. Subject-matter.

1. (April, 1797.) The jurisdiction of a federal court is not *prima facie* general, but special. *Maxfield's Lessee v. Levy*, 4 Dall. 308.

2. (April, 1800.) The Circuit Court cannot take original cognizance of a suit for a penalty incurred by an offense against the laws of the United States. If the offense was committed within a state, it must be tried in such state. *Evans qui tam v. Bollen*, 4 Dall. 318.

3. (Jan., 1844.) A title may be tried in Virginia, Kentucky, and Tennessee, as effectually upon a *caveat*, as in any other mode; and the parties, as also those claiming under them, are estopped by the decision. *Porterfield v. Clark*, 2 How. 77.

4. (Dec., 1851.) During the war between the United States and Mexico, where a trader went into the adjoining Mexican provinces, which were in possession of the military authorities of the United States, for the purpose of carrying on a trade with the inhabitants, which was sanctioned by the executive branch of the government, and also by the commanding military officer, it was improper for an officer of the United States to seize the property upon the ground of trading with the enemy. . . . The trespass was committed out of the limits of the United States. But an

action for it may be maintained in the Circuit Court for any district in which the defendant may be found, upon process against him, where the citizenship of the respective parties gives jurisdiction to the courts of the United States. *Mitchell v. Harmony*, 13 How. 115.

5. (Oct., 1874.) Although consent of the parties to a suit cannot give jurisdiction to the courts of the United States, the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission. *Railway Co. v. Ramsey*, 22 Wall. 322.

6. (Oct., 1875.) Where Congress, by one act, authorized the Secretary of the Treasury to purchase, in the city of Cincinnati, a suitable site for a building for the accommodation of the United States courts and for other public purposes, and by a subsequent act made an appropriation "for the purchase at private sale, or by condemnation of such site," power was conferred upon him to acquire, in his discretion, the requisite ground by the exercise of the national right of eminent domain; and the proper Circuit Court of the United States had, under the general grant of jurisdiction made by the act of 1789, jurisdiction of the proceedings brought by the United States to secure the condemnation of the ground. *Kohl v. United States*, 1 Otto, 367.

7. (Oct., 1876.) The action of Congress confirming a private land claim in New Mexico, as recommended for confirmation by the surveyor-general of that territory, is not subject to judicial review. *Sameling v. United States Freehold & Emigration Co.*, 3 Otto, 644.

8. (May, 1822.) The Circuit Court of the United States has jurisdiction, in a case between citizens of different states, to sustain a petition for partition, according to the statutes of Massachusetts, for partition of lands among tenants in common. *Ex parte C. C. Biddle*, 2 Mason, 472.

9. (June, 1828.) Where a Spanish vessel was captured by a Colombian privateer, and by collusion between the captors and an American citizen she was purposely wrecked on a key on the coast of Florida, within the territory of the United States, and the cargo was there landed, and the duties regularly paid; and afterwards the cargo was sold, and the American citizen became a purchaser thereof, and gave bills of exchange drawn by himself on a house in Charleston, South Carolina, which were dis-

honored,—it was *held* that the party was liable to be sued on such bills in an American court, and that the collusion between him and the captors, in procuring the shipwreck, was no bar to a recovery in such suit, as there was no fraud intended or perpetrated on the laws of the United States. *Hopner v. Appleby*, 5 Mason, 71.

10. (Oct., 1854.) A court of record, without any clerk or prothonotary, or other recording officer distinct from the judge of such court, is not competent, under the act of April 14, 1802 (2 Stat. at Large, 153), to receive an alien's preliminary declaration of his intention to become naturalized. *Ex parte Cregg*, 2 Curt. C. C. 98.

11. (May, 1854.) The authority of the judiciary to declare void any act of the legislature that is manifestly in conflict with the Constitution is well settled; but such authority should always be exercised with great caution and deliberation. *Darby v. Wright*, 3 Blatchf. 170.

12. (June, 1880.) An action against a town in Vermont, given by a statute of Vermont, for special damage from the insufficiency of a highway or bridge in the town, which the town was bound to keep in repair, is an action at common law, of which the Circuit Court of the United States has jurisdiction, under sec. 629 of the Revised Statutes of the United States, and sec. 1 of the act of March 3, 1875 (18 Stat. at Large, 470). *Keith v. Town of Rockingham*, 18 Blatchf. 246.

13. (April, 1806.) The lessor of the plaintiff, a resident in New York, as a member of the Population Company, was entitled to 165 acres out of 2,500 shares of a large body of lands in Pennsylvania, the legal title to which was originally in three trustees, who, before the institution of this suit, conveyed the land the object of this suit to him, with other tracts, by lease for six years; subject to an annual rent, and to a covenant by the lessor to bring suits to recover the land, and, at the end of the term, to deliver it up to the trustees. *Held*, that the title of the lessor of the plaintiff was sufficient to give the Circuit Court jurisdiction of the case. *Browne's Lessee v. Browne*, 1 Wash. 429.

14. The lessor of the plaintiff had an equitable estate in the land before the conveyance by the trustees; and the court could have compelled them to convey a legal estate to him, in which

case he could have maintained a suit in the Circuit Court. The conveyance of the trustees, having been voluntary, does not impair the jurisdiction. *Ib.*

15. A tenant in common, who is a citizen of another state, may sue in the Circuit Court for his portion, although his cotenants, who are citizens of the state where the lands are, cannot maintain such a suit. *Ib.*

16. (Oct., 1832.) This court has jurisdiction of an action of debt on a judgment obtained in a state court, by a citizen of another state. *Barr v. Simpson*, Baldw. 543.

17. (Nov., 1822.) An action of waste is not maintainable against a tenant by *elegit*, either upon the principles of the common law, or under the statute law of Virginia. *Scott v. Lenox*, 2 Brock. 57.

18. (June, 1867.) Courts have no policy, and can exercise no political powers. They can only declare the law. *Shortridge & Co. v. Macon*, Chase, 136.

19. (March, 1879.) As courts of justice may take cognizance of actions affecting the personal property of the government of a sovereign power, whenever the service of mesne process before adjudication does not involve the seizure of the property out of the hands of its officers, even though the proceeding looks to a judgment, final execution upon which, if issued, would dispossess the government; so they may take cognizance of actions concerning real property, especially in statutory ejectments, where the forms of law and the practice of the courts admit, under statutory provision, of a trial of the right or title upon a summons, and appearance of the occupant of the land, where he is an officer or agent of the government and his occupancy is not interfered with; and this is especially so when the government voluntarily intervenes to assist such officer or agent in defending its title to the land. *Lee v. Kaufman*,¹ 3 Hughes, 36.

20. (April, 1874.) The existence of martial law does not prevent the administration of justice between the citizens, in the civil courts. When such courts are authorized by the military power, they may exercise their functions, and their judgments and decrees will be binding on the parties. *Kimball v. Taylor*, 2 Woods, 37.

21. (April, 1879.) The act of Congress approved March 3,

¹ The Arlington case.

1875, "To determine the jurisdiction of Circuit Courts of the United States, and for the removal of causes from state courts, and for other purposes," enlarges the jurisdiction of the Circuit Courts to the full limits authorized by the Constitution. *State Lottery Co. v. Fitzpatrick*, 3 Woods, 222.

22. (Nov., 1868.) During the late civil war, where a United States officer in command of troops, while in an insurgent state, seized property belonging to a citizen of that state, and sold it to a third person, and the latter was sued, after the war, by the owner at the time of the seizure, — *Held*, that the court had no jurisdiction over the subject-matter. *Coolidge v. Guthrie*, 1 Flipp. 97.

23. The validity of such seizure could not be tried in a municipal court in a common-law proceeding, as such seizure was an act of war, and no action can be maintained in such court against the captor of booty. *Ib.*

24. (June, 1845.) The judiciary of the federal government cannot, it would seem, exercise a revisory jurisdiction over the state officers, in the performance of their duty. *Carroll v. Perry*, 4 McLean, 26.

25. But, if their acts be illegal, there is a remedy in the courts of the Union, as well as in the courts of the state. *Ib.*

26. (June, 1850.) The action of Congress in the allowance of damages is conclusive on the judiciary. It cannot revise the facts on which Congress acted. *United States v. Williams*, 5 McLean, 133.

27. (Nov., 1853.) The courts of the Union, having jurisdiction of the parties in a civil suit, are competent to administer the common-law remedy for an injury sustained by reason of an unlawful obstruction in a navigable stream, without any express legislation by Congress giving the remedy and prescribing the mode of its enforcement. *Jolly v. Terra Haute Draw-Bridge, Co.*, 6 McLean, 237.

28. (May, 1855.) Where a portion of the stockholders are citizens of other states, they may seek relief in the Circuit Court against an illegal taxation of their property by a state, although there be no allegation that the tax is in violation of the Constitution or laws of the United States. *Paine v. Wright & Railroad Co.*, 6 McLean, 395.

29. And in such case, the corporation doing its business in

the state, in order to obtain relief, may be made defendants. *Ib.*

30. The Circuit Court will give relief under the laws of the state, the same as the state court. *Ib.*

31. (June, 1858.) Under the act of April 10, 1806, and on the general principle that where the courts of the United States have original jurisdiction, whether from the character of the claim, or the citizenship of the parties, they may maintain proceedings against the marshal and his sureties, the Circuit Courts have jurisdiction of suits on marshals' bonds without reference to the citizenship of the parties. *Wetmore v. Rice*, 1 Biss. 237.

32. The cases where such jurisdiction may not be exercised are exceptional. *Ib.*

33. (Jan., 1864.) The United States courts have jurisdiction in all cases of marshals' bonds, irrespective of the citizenship of the parties; and this jurisdiction rests on the ground that, within the meaning of the Constitution, they are cases under the laws of the United States. *United States ex rel. De Loyne v. Davidson*, 1 Biss. 433.

34. Although the courts had no authority to maintain actions in this class of cases until Congress exercised the power to give jurisdiction, the act of April 10, 1806, having provided for suits on marshals' bonds, this jurisdiction is established. *Ib.*

35. (June, 1872.) A proceeding under an act of Congress to condemn property is a "suit of civil nature at common law or in equity," within the meaning of the Judiciary Act. *United States v. Block* 121, 3 Biss. 208.

36. The construction of that clause cannot be limited to such suits as were known at the time of the passage of the act. Whenever an act is passed which authorizes the commencement of a suit, jurisdiction of the case is thereby vested in the federal courts, if the character of the parties warrants it, and it comes within the meaning of the statute. The grant of power in this act is prospective. *Ib.*

37. The clause, "suits of a civil nature at common law or in equity," was used in contradistinction to admiralty and criminal cases. It does not restrict the jurisdiction to old and settled forms, but includes all suits in which legal rights are to be ascertained and determined. *Ib.*

38. It was the intention of Congress in this act to give this

court jurisdiction of the condemnation proceedings therein contemplated. *Ib.*

39. (May, 1874.) Since the Illinois statute of Feb. 16, 1874, the United States Circuit Courts in that state have, in proper cases, jurisdiction of actions of forcible entry and detainer. *Wheeler v. Bates*, 6 Biss. 88.

40. Such action is a "suit of a civil nature," within the meaning of the act of Congress of 1789. *Ib.*

41. (Feb., 1877.) The statutes of Indiana make all promissory notes negotiable so far as to vest the property in each indorsee successively; but unless a note is made payable to order or bearer at a particular bank, whatever equity the maker was entitled to against the payee he may assert against any indorsee. Under such a statute the United States courts have no jurisdiction of an action by an assignee of a note not made payable at a bank, as such a note is not a "promissory note negotiable by the law merchant." *Gregg v. Weston*, 7 Biss. 360.

42. (1872.) The federal courts have jurisdiction in suits by individuals upon a marshal's bond, even where all the parties to the suit are citizens of the same state, the reason being that the act of Congress of April 10, 1806, which gives the right to a party injured by breach of the bond to sue thereon in his own name, puts such party in the place of the United States, and does not take from the federal courts the jurisdiction they had before the act was passed, when suit had to be brought in the name of the United States. 2 Stat. 372. *Adler v. Newcomb*, 2 Dill. 45.

43. (Feb., 1877.) Where, in an action, the title to land in controversy held under patents issued upon confirmed Mexican grants depends upon a controverted construction of the patents, the national courts have jurisdiction, under the act of Congress of March 3, 1875. *Hills v. Homton*, 4 Sawyer, 195.

44. (Nov., 1877.) The original jurisdiction conferred upon the Circuit Courts by sec. 1 of the act of March 3, 1875 (18 Stat. 470), does not include an action arising out of the contracts or dealings of the parties, although upon its trial a question may arise involving the proper construction of a law of the United States. *Dowell v. Griswold*, 5 Sawyer, 39.

Jurisdiction in Equity. Subject-matter.

1. (Feb., 1805.) If the executor has no assets, you may proceed in equity against the devisees and legatees. *Milligan v. Milledge*, 3 Cranch, 227.

2. (Feb., 1809.) In Kentucky, it is a good ground of equitable jurisdiction that the defendant has obtained a prior patent for land to which the complainant had the better right, under the statute respecting lands; and in exercising that jurisdiction the court will decide in conformity with the settled principles of a court of chancery. *Bodley v. Taylor*, 5 Cranch, 191.

3. (Feb., 1819.) Charitable bequests, where no legal interest is vested, and which are too vague to be claimed by those for whom the beneficial interest was intended, cannot be established by a court of equity, either exercising its ordinary jurisdiction, or enforcing the prerogative of the king as *parens patriæ*, independent of the statute, 43 Eliz. *Baptist Association v. Hart*, 4 Wheat. 1, 2.

4. (Feb., 1819.) The Circuit Courts of the Union have chancery jurisdiction in every state; they have the same chancery powers and the same rules of decision in all the states. *United States v. Howland*, 4 Wheat. 108.

5. (Feb., 1823.) In cases of fraud and mistake courts of equity will relieve. *Hunt v. Rousmanier*, 8 Wheat. 174.

6. *It seems* that a court of equity will relieve in a case of mistake of law merely. *Ib.*

7. (Feb., 1824.) Although courts of equity have concurrent jurisdiction with courts of law, in all matters of fraud, yet, where the cause has already been tried and determined by a court of law, a court of equity cannot take cognizance of it, unless there be the addition of some equitable circumstance to give jurisdiction. *Smith v. M'Iver*, 9 Wheat. 532.

8. In such a case some defect of testimony, or other disability, which a court of law cannot remove, must be shown, as a ground for resorting to a court of equity. *Ib.*

9. (Feb., 1824.) The act of incorporation of the Bank of the United States gives the Circuit Courts of the United States jurisdiction of suits by and against the bank. *Osborn v. Bank of United States*, 9 Wheat. 738.

10. This provision in the charter is warranted by the third article of the Constitution, which declares, that "the judicial power shall extend to *all cases*, in law and equity, arising under this Constitution, *the laws of the United States*, and treaties made, or which shall be made, under their authority." *Ib.*

11. The Circuit Courts of the United States have jurisdiction of a bill brought by the Bank of the United States, for the purpose of protecting the bank in the exercise of its franchises, which are threatened to be invaded, under the unconstitutional laws of state; and, as the state itself cannot, according to the eleventh amendment of the Constitution, be made a party defendant to the suit, it may be maintained against the officers and agents of the state, who are intrusted with the execution of such laws. *Ib.*

12. (Feb., 1826.) A court of equity has jurisdiction of a suit brought by heirs-at-law, to set aside a conveyance of lands obtained from their ancestor by undue influence, he being so infirm, in body and mind, from old age and other circumstances, as to be liable to imposition, although his weakness does not amount to insanity. *Harding v. Handy*, 11 Wheat. 103.

13. The same jurisdiction may be exercised where one of the heirs-at-law has, with the consent of others, taken such a deed, upon an agreement to consider it as a trust for the maintenance of the grantor, and, after his death, for the benefit of his heirs, and the grantee-refuses to perform the trust. *Ib.*

14. In such a case, not depending on the absolute insanity of the grantor, at the time of executing the conveyance, the court may determine the question of capacity without directing an issue. *Ib.*

15. Under what circumstances such a conveyance may be allowed to stand as security for actual advances and charges, and set aside for all other purposes. *Ib.*

16. (Jan., 1829.) This court has decided that a suit could be maintained in equity, by the holder of an indorsed note, against a remote indorser, and upon grounds perfectly familiar to courts exercising equity jurisdiction. *Bank of United States v. Weisiger*, 2 Pet. 331.

17. It has been decided in Kentucky that a suit at law could not be maintained in that state, by the indorsee, against a remote indorser. The conclusion then results from our own decisions, that he must be let into equity; for an indorsement is certainly

no release to the previous indorsers; and the ultimate assignee alone is entitled to the benefit of their liability. And this we understand to be consistent with the received opinions and practice in Kentucky. *Ib.*

18. (Jan., 1830.) The courts of the United States have equity jurisdiction to rescind a contract on the ground of fraud, after one of the parties to it has been proceeded against on the law side of the court, and a judgment has been obtained against him for a part of the money stipulated to be paid by the contract. *Boyce v. Grundy*, 3 Pet. 210.

19. This court has been often called upon to consider the sixteenth section of the Judiciary Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. *Ib.*

20. It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and to its prompt administration, as the remedy in equity. *Ib.*

21. It is not an answer to an application to a court of chancery, for relief in rescinding a contract, to say that the fraud alleged is partial, and might be the subject of compensation by a jury. The law, which abhors fraud, does not permit it to purchase indulgence, dispensation, or absolution. *Ib.*

22. (Jan., 1831.) Where a fund was in the hands of an assignee of an insolvent, out of which the United States asserted a right to a priority of payment, in such a case proceedings at law might not be adequate, and it was proper to proceed in equity. *Hunter v. United States*, 5 Pet. 174.

23. (Jan., 1838.) Courts of chancery will not relieve for mere mistakes of law. This rule is well established, and the court will only repeat what was said in the case of *Hunt v. Rousmanier*, 1 Pet. 15, "That whatever exceptions there may be to the rule, they will be found few in number, and to have something peculiar in their character, and to involve other elements of decision." *Bank of United States v. Daniel*, 12 Pet. 33.

24. (Jan., 1839.) The State of Kentucky has an undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such cloud, are only

applying an old practice to a new equity created by the legislature, having its origin in the peculiar condition of the country. The unappropriated lands of the State of Kentucky have been opened to entry and grant, at a very cheap rate, which policy has let in abuses. The clouds upon old titles by the issuance of new patents for the same lands were the consequences; and the citizens of other states are entitled to come into the courts of the United States, to have their rights secured to them, by the statute of Kentucky of 1796. *Clark v. Smith*, 13 Pet. 195.

25. The state legislatures have, certainly, no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as in the state courts. On the contrary, propriety and convenience suggest that the practice should not materially differ when titles to land are the subjects of investigation. *Ib.*

26. In the State of Tennessee the legislature has provided that the courts of equity may divest a title, and vest it in another party to the suit; and that the decree shall operate as a legal conveyance. In Kentucky the legislature has declared that courts may appoint a commissioner to convey, as attorney in fact of litigant parties, and such shall pass the title; in both instances binding infants and *femes covert*s if necessary. The federal courts of the United States, in the instances referred to, have adopted the same practice for many years, without a doubt having been entertained of its propriety. *Ib.*

27. The undoubted truth is, that when investigating and decreeing on titles in this country, the court must deal with them in practice as it finds them, and accommodate our modes of proceeding, in a considerable degree, to the nature of the case, and to the character of the equities involved in the controversy, so as to give effect to state legislation and state policy; not departing, however, from what legitimately belongs to the practice of a court of chancery. *Ib.*

28. (Jan., 1844.) The decisions and *dicta* of English judges, and the recent publication of the Record Commissioners in England, examined as to the jurisdiction of chancery over charitable

devises anterior to the statute of 43 Elizabeth. *Vidal v. Girard*, 2 How. 128.

29. This part of the common law was in force in Pennsylvania, although no court having equity powers now exists, or has existed, capable of enforcing such trusts. *Ib.*

30. (Jan., 1844.) Although by the general law as well as the local law of Louisiana a will must be proved before a title can be set up under it, yet a court of equity can so far exercise jurisdiction as to compel defendants to answer, touching a will alleged to be spoliated. And it is a matter for grave consideration whether it cannot go further, and set up the lost will. *Gaines v. Chew*, 2 How. 619.

31. The exercise of chancery jurisdiction, by the Circuit Courts of the United States sitting in Louisiana, does not introduce any new principle. It is only a change of the mode of redressing wrongs and protecting rights. *Ib.*

32. (Jan., 1845.) In case of controversy, a court of equity is the proper tribunal to prevent an injurious act by a public officer, for which the law might give no adequate redress; or to avoid a multiplicity of suits; or to prevent a cloud from being cast over the title. *Carroll v. Safford*, 3 How. 441.

33. (Jan., 1848.) Although a new member cannot be admitted into a partnership without the consent of all parties, yet a person who has obtained a share in the concern can, after the partnership has expired, maintain a suit in chancery for his share of the profits. *Matthewson v. Clarke*, 6 How. 122.

34. (Jan., 1848.) A court of equity can decide the question whether or not a party is the heir of a deceased person. It is not necessary to send the issue of fact to be tried by a court of law. *Patterson v. Gaines*, 6 How. 550.

35. (Jan., 1849.) Where a lien existed on property by a special mortgage before the debtor's death, and the property passed, with the lien attached, into the hands of an executor, and was in the course of administration in the Probate Court, the Circuit Court of the United States had jurisdiction, notwithstanding, to proceed against the property, enforce the creditor's lien, and decree a sale of the property. And such sale was valid. *Erwin v. Lowry*, 7 How. 172.

36. (Jan., 1850.) Where there were joint and several bonds given for duties, and the United States had recovered a joint

judgment against all the obligors, and then the surety died, it was not allowable for the United States to proceed in equity against the executor of the deceased surety, for the purpose of holding the assets responsible. *United States v. Price*, 9 How. 83.

37. (Jan., 1850.) A court of equity, having obtained jurisdiction to enforce a specific performance of the contract, by compelling the company to issue a policy, can proceed to give such final relief as the circumstances of the case demand. *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390.

38. (Dec., 1851.) An indictment against a bridge as a nuisance, by the United States, could not be sustained; but a proceeding against it, on the ground of a private and irreparable injury, may be sustained, at the instance of an individual or a corporation, either in the federal or state courts. *Pennsylvania v. Wheeling, &c. Bridge Co.*, 13 How. 519.

39. In case of nuisance, if the obstruction be unlawful and the injury irreparable by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery. *Ib.*

40. (Dec., 1852.) Two statutes of Mississippi, one passed in 1843 and the other in 1846, provide that, where the charter of a bank shall be declared forfeited, a trustee shall be appointed to take possession of its effects, and commissioners appointed to audit accounts against it.

Where these steps had been taken, and the commissioners had refused to allow a certain account, the Circuit Court of the United States had no right to entertain a bill, filed by the creditors, to compel the trustee to pay the rejected account. There was a want of jurisdiction. *Peale v. Phipps*, 14 How. 368.

41. The cases upon this point examined. *Ib.*

42. (Dec., 1852.) A bill in chancery will not lie, for the purpose of perpetually enjoining a judgment, upon the ground that there was a false return in serving process upon one of the defendants. Redress must be sought in the court which gave the judgment, or in an action against the marshal. *Walker v. Robins*, 14 How. 584.

43. Moreover, the defendant in this case, by his actions, waived all benefit which he might have derived from the false return; and no defense was made on the trial at law, impeaching the correctness of the cause of action sued on; and in such

a case resort cannot be had to equity to supply the omission. *Ib.*

44. (Dec., 1853.) The Michigan Central Railroad Company, established in Michigan, made an agreement with the New Albany and Salem Railroad Company, established in Indiana, that the former would build and work a road in Indiana, under the charter of the latter.

Another company, also established in Indiana, called the Northern Indiana Railroad Company, claiming an exclusive right to that part of Indiana, filed a bill in the Circuit Court of the United States for the District of Michigan, against the Michigan company, praying an injunction to prevent the construction of the road under the above agreement.

The Circuit Court had no jurisdiction over such a case.

The subject-matter of the controversy lies beyond the limits of the district, and where the process of the court cannot reach the *locus in quo*.

Moreover, the rights of the New Albany company are seriously involved in the controversy, and they are not made parties to the suit. The act of Congress, providing for the non-joinder of parties who are not inhabitants of the district, does not apply to such a case as the present. *Northern Indiana Railroad Co. v. Michigan Central Railroad Co.*, 15 How. 233.

45. (Dec., 1855.) The courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed, as conclusive of the validity and contents of a will. An original bill cannot be sustained upon an allegation that the probate of a will is contrary to law. *Fouvergne v. New Orleans*, 18 How. 471.

46. (Dec., 1855.) In the State of Mississippi, a judgment of forfeiture was rendered against the Commercial Bank of Natchez, and a trustee was appointed to take charge of the books and assets of the bank. *Bacon v. Roberson*, 18 How. 480.

47. The courts of the United States have jurisdiction over the case, and a bill can be maintained, filed by a number of stockholders owning one fifth part of the capital stock, suing for themselves and such of the stockholders as were not citizens of Mississippi, nor defendants in the bill. *Ib.*

48. (Dec., 1856.) The Harmony Society was established upon the basis of a community of property, and one of the articles of

association provided, that if any member withdrew from it, he should not claim a share in the property, but should only receive, as a donation, such sum as the society chose to give.

One of the members withdrew, and received the sum of two hundred dollars, as a donation, for which he gave a receipt, and acknowledged that he had withdrawn from the society, and ceased to be a member thereof.

A bill was then filed by him, claiming a share of the property, upon the ground that he had been unjustly excluded from the society by combination and covin; and evidence offered, to show that he had been compelled to leave the society by violence and harsh treatment.

The evidence upon this subject related to a time antecedent to the date of the receipt. There was no charge in the bill impeaching the receipt, or the settlement made at its date.

Held, that, under the contract, the settlement was conclusive, unless impeached by the bill. *Baker v. Nachtrieb*, 19 How. 126.

49. (Dec., 1857.) The jurisdiction of the courts of the United States, as courts of equity, is ample to enforce the performance of trusts, under both the Constitution and laws. *Irvine v. Marshall*, 20 How. 558.

50. The United States can declare by Congress what the law shall be with respect to the public lands, and enforce that law through the judiciary department. *Id.*

51. (Dec., 1860.) The statutes of Ohio give to the local authorities of cities and incorporated villages power to make various improvements in streets, &c., and to assess the proportionate expense thereof upon the lots fronting thereon, which is declared to be a lien upon the property.

The city council of Toledo directed certain improvements to be made, and contracted with two persons (one of whom purchased the right of the other) to do the work, and authorized them to collect the amounts due upon the assessments.

The contractor who executed the work, and who was a citizen of another state, filed a bill upon the equity side of the Circuit Court to enforce this lien.

The court had jurisdiction of the case. *Fitch v. Creighton*, 24 How. 159.

52. (Dec., 1861.) Where land has been laid out in town lots, or otherwise divided among many occupants, who are threatened

with numerous suits, a bill in equity will lie to quiet the title, although the complainants have a legal title, and therefore an adequate remedy in a court of law in each several case. *Crews v. Burcham*, 1 Black, 352.

53. (Dec., 1862.) Courts of equity have concurrent jurisdiction with courts of law in cases of private nuisance ; but to this jurisdiction of the former courts there are some limitations, for many cases will sustain an action at law which will not justify relief in equity. *Parker v. Winnipiseogee Lake Cotton & Woollen Co.*, 2 Black, 545.

54. In what cases a court of equity will enjoin a nuisance, and in what cases not. *Ib.*

55. (Dec., 1864.) Where a bill in equity is necessary, to have a construction of the orders, decrees, and acts made or done by a federal court, the bill is properly filed in such federal court, as distinguished from any state court ; and it may be entertained in such federal court, even though parties who are interested in having the construction made would not, from want of proper citizenship, be entitled to proceed by original bill of any kind in a court of the United States. *Minnesota Company v. St. Paul Company*, 2 Wall. 609.

56. In such a case the question will not be, whether the bill filed is supplemental or original in the technical sense of equity pleading ; but whether it is to be considered as supplemental, or entirely new and original, in that sense which the Supreme Court has sanctioned with reference to the line that divides jurisdiction of the federal courts from that of the state courts. *Ib.*

57. (Dec., 1869.) Equity has always jurisdiction of fraud, misrepresentation, and concealment ; and this does not depend on discovery. *Jones v. Bolles*, 9 Wall. 364.

58. (Dec., 1869.) A proceeding to vacate the extension of a patent, of which the extension has expired before the proceeding was begun, has no equity to support it, and cannot be sustained on demurrer. *Bourne v. Goodyear*, 9 Wall. 811.

59. (Dec., 1871.) When, in courts of concurrent jurisdiction, the pendency of a suit in one is relied on to defeat a second suit in the other, the identity of the parties, of the case made, and of the relief sought should be such that if the first suit had been decided it could be pleaded in bar as a former adjudication. *Watson v. Jones*, 13 Wall. 679.

60. In such cases, the proceedings in an appellate court are part of the proceedings in the first court; and orders made by it to be enforced by the court of primary jurisdiction are, while unexecuted, a part of the case in the first suit, which may be relied on as *lis pendens* in reference to the second suit. *Ib.*

61. Hence an unexecuted order of this kind, made by a state court, to restore possession to the parties who had been deprived of it by a decree which had been reversed, cannot be interfered with by another court, by way of *injunction*, especially by a court of the United States, by reason of the act of Congress of March 2, 1793 (1 Stat. at Large, 334, s. 5.) *Ib.*

62. But the nature and character of the possession so decreed to be delivered may be inquired into by another court; and if it was of a fiduciary character, and the trust was not involved in the first suit, a second suit may be sustained in any court of competent jurisdiction, to declare, define, and protect the trust, though the first suit may be still pending. *Ib.*

63. (Oct., 1873.) Although a *mandamus*, and *alias mandamus*, and *pluries mandamus*, commanding a city to levy and collect a tax upon the taxable property of its citizens in it, to pay judgments which the relator in the *mandamus* has obtained against it, have all, in consequence of the devices of the city authorities, such as resignation of their offices, &c., proved unavailing to compel the levy and collection of the tax, and though "the prospect of future success" by the same writ "is perhaps not flattering," the federal courts, sitting in equity, do not possess power to appoint the marshal to levy and collect the tax, nor to subject the taxable property situate within the corporate limits of the city, in any way, to an assessment, in order to pay the judgment. *Rees v. City of Watertown*, 19 Wall. 107.

64. (Oct., 1873.) There can be no jurisdiction in equity, to enforce the payment of corporation bonds, until the remedy at law has been exhausted. *Heine v. The Levee Commissioners*, 19 Wall. 655.

65. Where the law has provided that a tax shall be levied to pay such bonds, a *mandamus*, after judgment, to compel the levy of the tax, in the nature of an execution or process to enforce the judgment, is the only remedy. *Ib.*

66. The fact that this remedy has been shown to be unavailing does not confer upon a court of equity the power to levy and collect taxes to pay the debt. *Ib.*

67. (Oct., 1875.) A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is, in essential particulars, a suit in equity; and if, by the law obtaining in a state, customary or statutory, such a suit can be maintained in one of its courts, whatever designation that court may bear, it may be maintained by original process in the Circuit Court of the United States, if the parties are citizens of different states. *Gaines v. Fuentes*, 2 Otto, 10.

68. (Oct., 1875.) A bill in chancery was filed in the Circuit Court of the United States for the District of Louisiana, by a citizen of Louisiana, the executrix of a deceased member of a firm, against the surviving partner, a citizen of Wisconsin, for an account, as part of the partnership assets, of the proceeds of a judgment recovered by the latter in said court, in his individual name, for a debt which she alleged was due the firm. The defendant, prior to the service of process on him, had, on his petition, been declared a bankrupt, by the District Court of the United States for the District of Wisconsin; but, answering to the merits, he denied that the debt was due to the partnership. An amended and supplemental bill was afterwards filed, making a defendant the assignee in bankruptcy, who adopted in a separate answer the defense set up by the original defendant. He, in an answer subsequently filed, claimed that the said District Court had exclusive jurisdiction in the cause. During its progress, a receiver was appointed, who collected the amount due on the judgment. The Circuit Court dismissed the cause for want of jurisdiction. *Held*, that notwithstanding the proceedings in bankruptcy, and although the assignee thereunder may have been appointed, and the assignment made to him prior to the filing of said bill, the Circuit Court, having possession of the subject-matter in controversy as well as jurisdiction of the parties, had jurisdiction of the cause, and should have decided it upon its merits. *Burbank v. Bigelow*, 2 Otto, 179.

69. (Oct., 1875.) The United States was under no obligation to prove its debt in the bankruptcy proceedings, or pursue the partnership effects of A., B., & Co. before filing this bill against the trustee; and the Circuit Court had original jurisdiction of the case thereby made, although the fund arose, and the trustee was appointed, under the Bankrupt Act. *Lewis v. United States*, 2 Otto, 619.

70. (Oct., 1877.) Pursuant to a statute of the Confederate States, and to an order of the Confederate District Court for the District of South Carolina, certain shares of the stock of a corporation of that state were, upon the ground that the owners of them were alien enemies, sequestrated and sold in 1862, at public auction; and the company was required to erase from its stock books the names of such owners, insert those of the purchasers, and issue stock certificates to them. All dividends, thereafter from time to time declared, were paid to the purchasers; against whom, or their assignees, and the company, this bill was filed by an original stockholder, praying for a decree that the certificates so issued be cancelled as null and void, and the defendants enjoined from selling them, bringing suits to effect the transfer thereof, or collect dividends thereon, and the company from allowing such transfers, issuing new certificates for the same, or paying such dividends. The court decreed accordingly. *Held*. . . . 2. That the bill was well brought, and the corporation a proper party defendant. *Dewing v. Perdicaries*, 6 Otto, 193.

71. (Oct., 1877.) A. made his will, appointing C. his executor, and devising his real property in South Carolina to B. for life; and after the determination of that estate, to C., in trust, to support certain contingent remainders in fee. A. afterwards entered into a contract to sell the property to D., who entered into possession, and paid a part of the purchase-money. A. died without receiving the balance or making a conveyance; and C. duly qualified as his executor. *Held*, that a bill by B. against C. and D., to compel the specific performance of the contract, would lie. *Bissell v. Heyward*, 6 Otto, 580.

72. (Oct., 1877.) Bonds issued by a corporation in Nebraska, secured by a mortgage on its lands there situate, were held by citizens of another state, who, on default of the corporation to pay the interest represented by the coupons, applied to the trustee named to take possession of the lands, pursuant to the mortgage, and bring a foreclosure suit. On his refusal, they filed their bill Sept. 24, 1873, in the Circuit Court, against him, the corporation, and other bond and coupon holders, all citizens of Nebraska, who refused to join in bringing suit. *Held*, that the complainants had the right to file their bill, and that the court below had jurisdiction, although some of the respondents were joined as such, solely on the ground that they had refused

to unite with the complainants in the prosecution of a suit to compel the trustee to foreclose the mortgage. *Hotel Co. v. Wade*, 7 Otto, 13.

73. (Oct., 1878.) The Circuit Court of the United States has now no original jurisdiction to reform surveys made by the land department of confirmed Mexican grants in California. *United States v. Throckmorton*, 8 Otto, 61.

74. (Oct., 1879.) A court will not, by reason of its jurisdiction of the parties, determine their respective rights to a tract of public lands, which are the subject-matter of a pending controversy whereof that department has rightfully taken cognizance, nor will it pass a decree which will render void a patent when it shall be issued. *Marquez v. Frisbie*, 11 Otto, 473.

75. Where the legal title is vested, the equities subject to which the patentee holds it may then be judicially enforced; and where that department has, upon the uncontradicted facts, committed an error of law, by which the land has been awarded to a party, to the prejudice of the right of another, the latter is entitled to relief. *Ib.*

76. Where, however, there has been a mixed question of law and fact, and the court cannot separate it, so as to ascertain what the mistake of law is, the decision of that department affirming the right of one of the contesting parties to enter a tract of public land is conclusive. *Ib.*

77. (Oct., 1880.) Where there has been no newly discovered evidence, a bill in equity will not lie to cancel a contract or enjoin a judgment thereon, where the complainant, against whom it was rendered, sets up as grounds of relief matters which he had full opportunity to plead in the action at law. *Life Insurance Co. v. Bangs*, 13 Otto, 780.

78. (May, 1818.) A court of equity has jurisdiction to decree an account and distribution, according to the *lex domicilii*, of the estate of a deceased person domiciled abroad, which has been collected under an administration granted here. *Harvey v. Richards*, 1 Mason, 381.

79. (June, 1821.) The Circuit Court, notwithstanding the restrictive clause in the Judiciary Act of 1789, ch. 20, s. 11, has jurisdiction in a suit in equity brought by a judgment creditor, against his debtor and others (they being citizens of different States), to set aside conveyances made in fraud of creditors, although the

ground of the judgment was a negotiable *chose in action*, on which, before judgment, a suit could not have been maintained in such court. *Bean v. Smith*, 2 Mason, 252.

80. (June, 1828.) The courts of the United States, as courts of equity, possess jurisdiction to maintain suits in favor of legatees and distributees for their portions of the estate of the deceased, notwithstanding there may be, by the local jurisprudence, a remedy at law on the administration bond, in favor of the party. This class of cases is of concurrent, and not of exclusive, jurisdiction. *Pratt v. Northam*, 5 Mason, 95.

81. (May, 1829.) Courts of equity have jurisdiction to enforce a specific performance of an award respecting real estate. *McNeil v. Magee*, 5 Mason, 245.

82. (Oct., 1833.) In a case of asserted fraud, or constructive trust, created by operation of law, the jurisdiction of a court of equity is sustainable where the person can be found, although the lands to be affected by the decree are not within the jurisdiction of the court. *Briggs v. French*, 1 Sumn. 504.

83. A court of equity has jurisdiction in a case where relief is sought against a meditated fraud, which throws a cloud over the title of a party. *Ib.*

84. (Oct., 1843.) The equity jurisdiction and equity jurisprudence administered in the courts of the United States are coincident and coextensive with that exercised in England, and are not regulated by the municipal jurisprudence of the particular state where the court sits. *Fletcher v. Morey*, 2 Story, 555.

85. (Oct., 1844.) The court possesses full jurisdiction in equity in all cases of fraud, including fraud in obtaining judgments and decrees in other courts, excepting fraud in obtaining a will of real and personal estate; and has concurrent jurisdiction with the state courts in all such cases. *Gould v. Gould*, 3 Story, 516.

86. (Oct., 1845.) If the bill prays for an injunction against the use of a patent, the question as to the issuing that may come within the laws of the United States. *Nesmith v. Calvert*, 1 Woodb. & M. 34.

87. (Oct., 1854.) A court of equity has jurisdiction to take an account of a general average loss, and decree contribution among those entitled to receive, and bound to pay. *Sturgess v. Cary*, 2 Curt. C. C. 59.

88. (May, 1859.) Equity jurisdiction will not be entertained in a case where the complainant alleges damages to his rights, in consequence of the wrongful acts of the respondents, and where the whole case made in the bill is denied in the answer, unless the right of the complainant is clear and well defined, and there is danger of irreparable injury from the continuance of the nuisance, or unless, where the right is clear and the injury certain, an injunction is necessary to prevent multiplicity of suits, or suppress interminable or oppressive litigation. *Parker v. Winnipiseogee Lake Cotton & Woollen Mfg. Co.*, 1 Cliff. 247.

89. (Oct., 1868.) The Circuit Court in this district has jurisdiction to grant relief, under a bill praying for an account of certain funds received by a testator from the complainant, under a promise to invest the same for the complainant, where the testator died in Rhode Island, and his last will and testament was proved there, but administration was also granted in this State [Massachusetts], where the testator left real and personal estate to a large amount. *Walker v. Beal*, 3 Cliff. 155.

90. (Oct., 1872.) Courts of equity possess the power to correct mistakes in policies of insurance, even to the extent of changing the most material clauses; but the power should be exercised with great caution, and only when the proof is entirely satisfactory. *Hearn v. Insurance Company*, 4 Cliff. 192.

91. (April, 1847.) Chancery has jurisdiction of a bill filed by a judgment creditor, for relief against a conveyance of land by his debtor, made with intent to defeat the lien of the judgment, or to hinder or delay its satisfaction, whether execution has been issued on it or not. *McCalmont v. Lawrence*, 1 Blatchf. 232.

92. It is competent for chancery to order the assignee of real estate fraudulently conveyed to him, to reconvey it to the assignor, in order that execution may act upon it; or to order him to convey it to the proper officer of the court, or otherwise, so as best to appropriate it to satisfy the judgment debt. *Id.*

93. (March, 1855.) A *cestui que trust* may maintain a bill for an injunction against his trustee, to prevent his collecting, appropriating, or disposing of the trust property. *St. Luke's Hospital v. Barclay*, 3 Blatchf. 259.

94. (Oct., 1868.) The fact that such [foreign] corporation has no property in this district, and no property anywhere, but

the demands for such unpaid subscriptions [for stocks], is no objection to the jurisdiction of this court. *Winans v. Railroad & Navigation Co.*, 6 Blatchf. 215. .

95. (Dec., 1868.) This court has jurisdiction of a suit in equity brought to restrain the building of a bridge across the Connecticut River, between Saybrook and Lyme, to be used for a railroad, although the construction of such bridge is claimed to be authorized by the legislature of the State of Connecticut. *Baird v. Railway Co.*, 6 Blatchf. 276.

96. (June, 1870.) The fact that the lands [sought to be redeemed from a deed of trust] lie in the State of West Virginia, does not deprive this court of jurisdiction of such suit. *Kanawha Coal Co. v. Kanawha & Ohio Coal Co.*, 7 Blatchf. 393.

97. (Oct., 1871.) A bill in equity was filed by an assignee in bankruptcy against the bankrupt and another, to set aside a conveyance of property made by the bankrupt to the other defendant, and to compel an account of the same, and payment to the plaintiff, and for a discovery. The bankrupt demurred to the bill for want of equity. *Held*, that the jurisdiction to entertain such a bill is clear. Independent of the question, whether the assignee may not always, if he sees fit, seek the aid of a court of chancery, to set aside a fraudulent conveyance or illegal transfer, instead of proceeding by various actions at law, the right to call for an account is not questionable. *Verselius v. Verselius*, 9 Blatchf. 189.

98. (Aug., 1874.) Citizens of Connecticut, as stockholders in a Vermont railroad corporation, brought this suit to restrain the execution of a lease of the railroad of the corporation to another Vermont railroad corporation, alleging that the execution of such lease was contrary to the expressed will of a majority of the stockholders, and in disregard of the rights and interests of all who were stockholders, and a fraud upon such rights; that the persons threatening to make such lease were a former board of directors, holding over after their term of office had expired, and being in the actual possession of the seal, books, papers, and money of the corporation, and in the apparent control and management of its affairs, but who were, in fact, largely interested in such other railroad company, and were thereby induced to sacrifice the interests of the plaintiffs' corporation, and were, to that end, conspiring with such other company, in fraud of the stockholders in the plaintiffs' corporation, and in breach of trust; that,

to perpetuate such apparent control, and effect the fraudulent purpose aforesaid, such former board of directors refused to call a meeting of stockholders for the annual election of directors, thereby exposing the company to a forfeiture of its charter; that, notwithstanding such refusal, the president did call a meeting, at which a new board of directors was chosen, but such former directors denied the validity of such election, retained the possession and management of the affairs of the corporation, and persisted in their determination to execute such lease; that the plaintiffs had called upon such new board of directors, and required them, by suit or otherwise, to prevent the execution of such lease, and prevent the transfer or wrongful disposition of the property threatened by such holding-over board, and to themselves obtain possession; but that, although such new board concurred with the plaintiffs, and admitted that such lease would be a violation of the rights of the stockholders, they refused to take any such measures, by suit or otherwise, alleging that they so refused in consideration of the many obstacles in the way of obtaining such relief in the state courts. The defendants were the said former board of directors (citizens of Vermont, Massachusetts, and New York), the new board of directors (citizens, also, of Vermont, Massachusetts, and New York), and the corporation itself, with the other corporations embraced in the alleged conspiracy. The bill prayed for an injunction, and that such holding-over directors be decreed to surrender the road and property to the corporation, or to a receiver, and give up the seal, books, papers, and money to the new board, or to a receiver; that a receiver be appointed; and for such other and further relief as to equity might appertain. To this bill one of the defendants pleaded to the jurisdiction of the court, that certain of the defendants were citizens of Vermont, and that their rights and interests were identical with those of the plaintiffs, and that they were made defendants for the purpose of giving this court a colorable and false jurisdiction, when, in truth, they were plaintiffs, aiding in the prosecution of the suit. Another defendant, after having answered the bill, made a motion, founded on affidavits, to dismiss the bill, on the same grounds stated in the plea, and alleging that some of the defendants had conspired with the plaintiffs, for the fraudulent purpose of giving the court jurisdiction, and that the refusal of such new board of directors to bring

suit was for the purpose of giving this court jurisdiction, and was a fraud upon the court. The court overruled the plea, and denied the motion. *Pond v. Vermont Valley Railroad Co.*, 12 Blatchf. 280.

99. A court of equity has jurisdiction, at the instance of stockholders in a corporation, to restrain the corporation and those who have the control and management thereof, from acts tending to the destruction of its franchises, from violations of the charter, from misuse or misappropriation of the corporate powers or property, and from other acts prejudicial to the stockholders, amounting to a breach of trust. *Ib.*

100. Such jurisdiction will be entertained notwithstanding the case may involve, as an incidental question, the inquiry which of two is the legal board of directors. *Ib.*

101. Where the board of directors are themselves the wrongdoers, or they refuse to prosecute, to restrain or redress the wrong, stockholders may file the bill. *Ib.*

102. So, where one board, claiming to be directors, are wrongdoers, and the other board, claiming and alleged to be the legal directors, refuse to prosecute, stockholders may file the bill. *Ib.*

103. The plaintiffs cannot be defeated of their right to sue in the federal court, by the fact that the members of such legal board of directors have, as stockholders, the same interest as the plaintiffs, or that they desire the success of the plaintiffs, nor by the fact that the refusal of the said legal board of directors was in order to drive the plaintiffs to bring the suit themselves, or even to enable the plaintiffs to bring their suit in the federal court. *Ib.*

104. (Aug., 1876.) A citizen of New York brought suit in this court against the municipal corporations of the cities of New York and Brooklyn, and certain individual citizens of New York, to restrain the building of a bridge in New York across the East River, a navigable river, on the ground that it would be a public nuisance. *Held*, that this court had no jurisdiction of the suit, so far as any question of the violation of the law of New York was concerned, but that it could take jurisdiction to inquire whether the bridge was being so built as to violate the Constitution or laws of the United States. *Miller v. The Mayor, &c. of the City of New York*, 13 Blatchf. 469.

105. (Jan., 1878.) *Held*, that on the facts set forth [acts of

mismanagement and breach of trust on the part of the president and directors of a Connecticut corporation, &c.], the court could prevent the continuance of the breach of trust, and could compel the officers to account for such as they had committed; but that, to obtain such relief, it should be specifically prayed for; and the plaintiff was given leave, on motion, to amend his bill in respect to the prayer for relief. *Hardon v. Newton*, 14 Blatchf. 376.

106. (May, 1879.) The plaintiff, owning first-mortgage bonds of a railroad company, brought this suit, in this court, to foreclose the mortgage and remove the two trustees, alleging that one was the sole trustee in a claimed preference mortgage of the same property, which he was seeking to foreclose in a court of the state, in which proceeding the other trustee had been appointed a receiver of the property, and was in possession. There were demurrers, and a plea of the pendency of those foreclosure proceedings, and a plea of the filing of a cross-bill therein by the trustees of the first mortgage for foreclosure, on the day after the filing of the bill in this suit, in which the plaintiff was named a defendant, and on whom process was served by an order of the state court, out of the state, before the service of the subpoena in this suit. The case was heard on the pleas set down for argument, and the demurrers. *Held*, —

(1.) This court will not stay this suit until the proceedings in the state court shall be completed;

(2.) This court can and will proceed with this suit, although the property is in the possession of a receiver of the state court, though it will do nothing to disturb such possession, or to interfere with the receivership;

(3.) The service of the process of the state court on the plaintiff, as a defendant to the cross-bill, out of the state, was not effectual;

(4.) The fact that the mortgage trustees brought the cross-bill, did not draw the plaintiff in, and make him a party to it, by representation, as the trustees represent, in the suit, only the rights of such bondholders as join in it;

(5.) The position of the trustees is such that they cannot alone properly represent the bondholders, and no refusal by them to foreclose, after a request by the plaintiff, need be shown;

(6.) It is no objection to this suit, that this court cannot settle

the accounts of the receiver. *Mercantile Trust Co. v. Lamoille Valley Railroad Co.*, 16 Blatchf. 324.

107. (Oct., 1808.) Davis M'Gee was indebted to the complainant, and, after his decease, administration was granted to his effects in New Jersey, to James M'Gee, the defendant; who, in answer, stated that he had administered all the effects of the deceased, except \$760, which he was ready to distribute; but claimed that he could be called upon to settle his administration account only in the State of New Jersey.

The court held, that the defendant, having stated that he had property in his hands, might be called upon, *in equity*, to account for that property anywhere. *Bryan v. M'Gee*, 2 Wash. 337.

108. (April, 1819.) A court of equity has jurisdiction in a suit brought by the trustee against the *cestui que trust*, to direct an issue *devastavit vel non*, and to decree possession of the land to the trustee to enable him to execute the trust. *Harrison v. Rowan*, 4 Wash. 202.

109. General principles regulating equity jurisdiction. *Ib.*

110. (April, 1820.) Jurisdiction of courts of equity over trusts, and confirming the appointment of an agent made by a majority of the trustees, or in appointing an agent by the court. *Barings v. Willing*, 4 Wash. 248.

111. (Oct., 1831.) A bill to account lies only when an action to account lies at law, and when the case comes under some appropriate head of equity jurisdiction. *Baker v. Biddle*, Baldw. 394.

112. (Sept., 1856.) The equity for an account in patent and copyright cases, is not, in the courts of the United States, a mere incident to a right to injunction; however this may be by the rules of English chancery. *Blank v. The Manufacturing Co.*, 3 Wall. Jr. 196.

113. In the courts of the United States the right to an account may exist, and an account be directed, where there can be no injunction; as, *e. g.*, where the term of the patent has expired before the final hearing of the case. *Ib.*

114. (April, 1848.) The complainant's claim being merely for dividends on the stock, and not for the stock itself, and this court's jurisdiction over the case being based on the alienage of the complainant, it cannot do what the facts would otherwise warrant, and decree in favor of those of the defendants who are

entitled to the stock after the complainant's death; although the court would be authorized to do so, if the complainant's interests required it. *Lowry v. Commercial & Farmers' Bank*, Taney's Dec. 312.

115. (Dec., 1862.) Where an incorporated company would be the proper complainant in a chancery suit, but refuses to bring the suit, when required by a stockholder to do so, and the controversy is between different classes of its stockholders, a court will entertain a bill brought by a stockholder to settle such controversy. *City of Wheeling v. Mayor of Baltimore*, 1 Hughes, 90.

116. (April, 1871.) When the validity of a will is brought in question incidentally on questions of title to property [under the law of Louisiana], it is open for investigation in any court in which the title may be litigated, whether a state court or a court of the United States. *Fuentes v. Gaines*, 1 Woods, 112.

117. (April, 1871.) A judgment creditor, who has exhausted his legal remedy by execution returned *nulla bona*, may alone, or with other judgment creditors, file a bill against persons holding property of the debtor, which, on account of fraud, or the existence of a trust, cannot be reached by the execution. *Marsh v. Burroughs*, 1 Woods, 463.

118. A judgment creditor, who has exhausted his legal remedy, may pursue in a court of equity any equitable interest, trust, or demand of his debtor, in whosoever hands it may be. If a party thus reached has a remedy over against others for contribution or indemnity, it will be no defense to the primary suit against him, that they are not parties. *Id.*

119. Where a debtor, as in case of a bank, has a right to call for payment of stock subscriptions, and does not choose to exercise it, equity, at the instance of creditors, will exercise it for him. *Id.*

120. When a judgment creditor of a bank has exhausted his remedy at law, and seeks in equity to enforce payment of stock subscriptions, the stockholders cannot go behind the judgment rendered against the bank, and question the original cause of action, unless they can show collusion between the creditor and the bank, for the purpose of defrauding them. *Id.*

121. (Nov., 1873.) The fact that holders of bonds issued by a state are prohibited, by the Eleventh Amendment to the Con-

stitution of the United States, from obtaining judgment on their bonds, by suit against the state, in a court of the United States, does not authorize a court of equity, by decree, to compel the state officers to levy and collect a tax for the payment of principal and interest of the bonds. *McCauley v. Kellogg*, 2 Woods, 13.

122. A court of the United States will not compel, by injunction, the officers of a state to execute the laws of the state. To do so would be an attempt by the court to administer the state government. *Ib.*

123. An action in a court of the United States against the executive officers of a state, in their official capacity, to compel them to comply with a contract of the state by the enforcement of its laws, is, to all intents and purposes, an action against the state, and prohibited by the Eleventh Amendment to the Constitution of the United States. *Ib.*

124. (Nov., 1875.) A bill which charges that the defendant, through fraudulent practices, had secured the transfer to his own name of shares of stock in an incorporated company, to which the complainant held the equitable title, and prayed that the complainant might be declared the owner of the stock, presents a good case for the intervention of a court of equity. In such a case, there is no adequate relief at law. *Kilgour v. Gas Light Co.*, 2 Woods, 144.

125. (April, 1876.) It is an indispensable prerequisite to a creditor's bill, which seeks to subject property of the debtor fraudulently conveyed, to the payment of the complainant's claim, that the claim should first have been reduced to judgment. *Stewart v. Fagan*, 2 Woods, 215.

126. (Dec., 1874.) A railroad company having its residence and principal office at Atlanta, Georgia, conveyed to trustees, by one deed, all its line of road extending from Atlanta, through South Carolina, to Charlotte, N. C., and other property, to secure the payment of the principal and interest of 4,248 bonds of \$1,000 each, issued by the railroad company. The railroad was an indivisible and inseparable piece of property, which could not be divided without injury to its value. The trust deed conferred authority on the trustees, and made it their duty, in case the railroad company failed to pay either the interest or principal of the bonds, to take possession of the property conveyed by the

trust deed, and advertise and sell the same (or such part as might be necessary), at Atlanta, to pay the sum in default. *Held*, —

(a) That, on default made in the payment of interest, and a demand upon the trustees by the bondholders that they should take possession of the trust property, and a failure of the trustees to do so, the court, on a bill filed by the bondholders to require them to execute the trust, would compel them to take possession of the trust property, or appoint a receiver for that purpose.

(b) Such appointment would be made, even though there was no probable deficiency of the trust property to pay the debts secured by the trust deed.

(c) When it was represented that the trust property had fallen into the hands of two different receivers accountable to three different courts, to the manifest detriment of the trust estate, that fact of itself was considered a sufficient reason for the appointment of a receiver for the whole property, if the court had jurisdiction to make such appointment.

(d) The Circuit Court of the United States for the Northern District of Georgia has jurisdiction to appoint a receiver for the entire line of said company's road and other property included in the deed of trust, whether within or without the state. *Wilmer v. Railway Co.*, 2 Woods, 409.

127. (May, 1875.) Lands belonging to the public domain of a state, which, by an act of the legislature, had been made a trust estate for the payment of certain bonds, and placed under the control of trustees appointed by law, were subject to the power of a court of equity to raise therefrom the money due and chargeable thereon, and the court could appoint its own agents to make sales thereof. *Vose v. The Trustees*, &c., 2 Woods, 648.

128. In such a case, the court has the power to compel the trustees who hold the legal title, to execute conveyances for the lands sold by the agents of the court. *Ib.*

129. (April, 1879.) A bill in equity which alleged that a state had, by legislative act, chartered a lottery company with the right to exercise its functions for twenty-five years, the lottery company to pay to the state the sum of \$40,000 annually, and had passed a subsequent act repealing the charter of the company, and making it a penal offense to carry on the business authorized by the charter, and which charged that said repealing

act impaired the obligation of the contract between the state and the lottery company, disclosed a case arising under the Constitution of the United States, of which the Circuit Court had jurisdiction, irrespective of the citizenship of the parties. *State Lottery Co. v. Fitzpatrick*, 3 Woods, 222.

130. Generally, courts of equity do not deal with matters of crime, misdemeanors, or offenses against prohibitory laws, but they will interfere, by injunction, to stay proceedings, whether connected with crime or not, which go to the immediate, or tend to the ultimate, destruction of property, or to make it less valuable for use or occupation. *Ib.*

131. (June, 1878.) Where complainants, in a bill in equity to recover lands of which the defendants were in possession, claimed only an equitable title thereto, and did not set up any facts tending to show that the defendants were in any way affected by their equity, — *Held*, that the bill could not be maintained. *Young v. Porter*, 3 Woods, 342.

132. The bare fact that parties who hold an equitable title to land cannot sue at law does not give a court of equity jurisdiction. *Ib.*

133. The remedy of parties so situated is first to obtain the legal title, and then bring their action at law against the parties in possession of their land. *Ib.*

134. (Nov., 1878.) A court of equity has no jurisdiction of a suit on a bond, which, it is alleged, was, through the fraud of a person not a party to the suit, delivered up to be canceled, but which it was claimed was still in force, where no discovery was sought, and where the bill furnished a substantial copy of the bond. *Girard Ins. Co. v. Guerard*, 3 Woods, 427.

135. (April, 1879.) The courts of the United States, within a state, have equal and concurrent power with the courts of the state, to render judgments, and carry them into execution. *Georgia v. Railroad Co.*, 3 Woods, 434.

136. Where a levy on railroad property is suspended by an affidavit of illegality and bond, under the Code of Georgia, the federal court does not exceed its jurisdiction in taking possession of the same property by its receiver. *Ib.*

137. (Oct., 1866.) A court of the United States has no jurisdiction, in case of a bill by a citizen of the state in which the bill is filed, to restrain a collector of internal revenue from the collec-

tion of an alleged illegal income tax. *Roback v. Taylor*, 2 Bond, 36.

138. The only remedy given by law is by appeal to the district assessor; and, failing thus to obtain redress, by appeal to the commissioner of internal revenue. *Ib.*

139. The provision of the Constitution of the United States, declaring that the judicial power should extend to all cases arising under the laws of the United States, is not a self-executing power, and does not vest the courts with jurisdiction without the action of Congress for that purpose. *Ib.*

140. (Nov., 1861.) The Circuit Court of the United States has jurisdiction to declare void a fraudulent assignment, notwithstanding the special provisions of a state statute, as to setting aside assignments made by a debtor in contemplation of insolvency; and it can direct the application of the fund assigned. *Burt v. Keyes*, 1 Flipp. 61.

141. (Dec., 1838.) No individual has a right to prosecute, in his own name, for a public nuisance. He cannot so prosecute, unless the act complained of be a private nuisance to himself. *Spooner v. Mc Connell*, 1 McLean, 338.

142. (Oct., 1843.) Under the statute of Michigan, a creditor's bill may be filed on the return of an execution, by the proper officer, *nulla bona*, before the return-day named in the writ. *Howe v. Cobb*, 3 McLean, 270.

143. (July, 1844.) An assignee in bankruptcy has a right to file his bill in chancery against different mortgagees, to test the validity of their mortgages. *M'Lean v. Lafayette Bank*, 3 McLean, 415.

144. (June, 1845.) A creditor's bill is sustainable in the courts of the United States, under the mode of proceedings, as authorized in chancery by state statutes. And in this form, property fraudulently conveyed, or choses in action, may be subjected to the payment of judgment. *Suydam v. Beals*, 4 McLean, 12.

145. (May, 1847.) To enforce an equitable lien is the appropriate jurisdiction of a court of equity. *Vallette v. Canal Company*, 4 McLean, 192.

146. (April, 1851.) A court of equity may not decree a forfeiture. It will relieve against a penalty, but not against stipulated damages. *Goesele v. Bimeler*, 5 McLean, 223.

147. Nor will a court of chancery give relief against the *bona fide* contract of a party, entered into for a valuable consideration. *Ib.*

148. (May, 1851.) A contract was made for the purchase of certain tracts of land, as a consideration for which, \$6,000 were to be paid, and certain work was to be done. The money was paid, but the work was not done. A bill [for specific performance] being filed under such circumstances, it was dismissed. *Denniston v. Coquillard*, 5 McLean, 253.

149. There is no principle in chancery better established, than that the party who asks a specific performance must show performance on his part, or that he has offered to perform, and been prevented from doing so by the acts of the defendant. *Ib.*

150. (Oct., 1851.) The rule, though general, is not universal, that more than one trial at law is required to authorize a bill of peace. Much depends upon the circumstances of the case. *Harmer v. Gwynne*, 5 McLean, 313.

151. (Oct., 1854.) The tax law of 1852 [in Ohio], against banks incorporated under the act of 1845, having been declared unconstitutional, it can afford no justification to the treasurer of the county in collecting the tax.

A citizen of Connecticut, being a stockholder, may file his bill for an injunction against the collection of the tax, making the directors of the bank defendants, which will enable the court to give relief the same as if the directors were plaintiffs. *Woolsey v. Dodge et al.*, 6 McLean, 142.

152. (May, 1855.) Where a portion of the stockholders are citizens of other states, they may seek relief in the Circuit Court against an illegal taxation of their property by a state, although there be no allegation that the tax is in violation of the constitution or laws of the United States. *Paine v. Wright*, 6 McLean, 395.

153. And in such case, the corporation doing business in the state, in order to obtain relief, may be made defendants. *Ib.*

154. (Sept., 1872.) The United States courts have not jurisdiction to restrain a sheriff from selling under an execution issued from a state court. *Ruggles v. Simonton*, 3 Biss. 325.

155. (July, 1874.) The United States Circuit Court has jurisdiction of a bill by non-resident creditors, to restrain the rail-

road commissioners from actions injurious to their rights. *Piek v. Railway Co.*, 6 Biss. 177.

156. (Feb., 1875.) The court will not forfeit the franchise of a corporation on the application of individuals; the right belongs to the state alone. *Gaylord v. Railroad Co.*, 6 Biss. 286.

157. But if the bill prays for a receiver and general relief, the court will retain the bill for that purpose. A forfeiture of the franchise is not essential to the power of appointing a receiver. *Ib.*

158. (May, 1877.) An assignee in bankruptcy may maintain an action to set aside fraudulent conveyances made by the debtor before he is adjudged a bankrupt, and even before the Bankrupt Act was passed, provided the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration, and provided the action is not barred by the statute of limitations. *Cady v. Whaling*, 7 Biss. 430.

159. Courts of equity possess a general concurrent jurisdiction with courts of law, in cases of frauds cognizable in the latter. *Ib.*

160. An assignee in bankruptcy stands in the position of judgment-creditor, and can bring a suit in equity to set aside a fraudulent conveyance. *Ib.*

161. (Oct., 1868.) In the cases in which the action of these officers [register and receiver of a land-office] has been examined and revised by the courts, jurisdiction has not been assumed until after the Land Department has ceased to act upon the matter. *Litchfield v. The Register and Receiver*, Woolw. 300.

162. (1870.) A bill in equity by an insurance company against the assured, to enjoin an action at law on the policy, and to cancel the same because it was procured by false and fraudulent representations, ought to be dismissed when it is solely founded upon matters which, if true, are a defense to the law action, and where no reasons are shown making a resort to equity necessary or expedient. *Home Ins. Co. v. Stanchfield*, 1 Dill. 424.

163. Accordingly, where such a bill was not filed until after the loss had happened, and where, in consequence of a short limitation clause in the policy, and averments in the bill that an action was threatened, it appeared there was no danger of long

or indefinite delay, and where no reason was shown why the matters charged in the bill were not plainly available as a complete defense at law, the court dissolved the injunction and dismissed the bill. *Ib.*

164. It seems that such a bill would lie if filed before loss. Per MILLER and DILLON, JJ., *arguendo*. *Ib.*

165. Where discovery is the ground of equity jurisdiction, if the discovery fails, the bill must be dismissed, although there may be evidence *aliunde* sufficient to establish a right to relief. *Ib.*

166. (1870.) Matters such as fraud, which should have been pleaded as a defense, are not sufficient grounds after judgment, upon which to apply to equity to enjoin process to collect the judgment. *City of Muscatine v. Railroad Co.*, 1 Dill. 536.

167. (1871.) The assignee in bankruptcy may recover money fraudulently paid by the bankrupt to the defendants in order to obtain their signature to a composition agreement. Equity will entertain such a bill by the assignee, although he might have maintained an action at law. *Bean v. Brookmire*, 1 Dill. 151.

168. (1871.) This court has jurisdiction of a bill in equity filed by the defendant in a judgment rendered therein, against an assignee of the judgment plaintiff, to set aside the judgment for fraud, though such assignee and the complainant be citizens of the same state; such a proceeding is, in substance, a continuation of the original suit. *O'Brien County v. Brown*, 1 Dill. 588.

169. The bill brought by a county to set aside a judgment charged to have been fraudulently procured on county warrants fraudulently issued (the assignee of the judgment being charged with complicity in, and notice of, the frauds alleged), held sufficient on demurrer. *Ib.*

170. (1872.) Where the fund arising from the sale of distillery property, under condemnation proceedings, is in the District Court, and the proceedings are there still pending, the Circuit Court, on an original bill in chancery, cannot withdraw that fund from the District Court, or direct how it shall be distributed. *United States v. Mackoy*, 2 Dill. 300.

171. (1873.) Equity has jurisdiction to remove a cloud upon the title to real estate, where there is no adequate remedy at law. *Morton v. Root*, 2 Dill. 312.

172. (1873.) Where no remedy exists to recover back illegal *state* taxes when paid into the treasury, equity will restrain their collection, the plaintiff being otherwise without adequate remedy at law; and equity, having jurisdiction in such a case, will determine the validity of *county* as well as *state* taxes, embraced in the same collection warrant and levy. *First National Bank of Omaha v. Douglas County*, 3 Dill. 298.

173. (May, 1880.) If, in a direct proceeding to set aside the decree of another court, there are parties before the court other than those in the proceeding in which the decree was rendered, and it is charged that such decree was fraudulent, the court may entertain jurisdiction thereof, and prevent the parties before it from proceeding to enforce such decree or availing themselves of any advantages thereunder. *Sahlgard v. Kennedy*, 1 McCrary, 291.

174. (July, 1856.) The Circuit Court will entertain a bill filed by one in prior possession, accompanied by title, to remove a cloud upon title. *Bayerque v. Cohen*, McAll. 113.

175. Where a state law authorizes a party in possession of real estate to sue for a settlement of an adverse claim, the Circuit Courts will look to it in aid of their general chancery powers. *Ib.*

176. Although the laws of a state cannot affect the equity jurisdiction of the Circuit Courts, when the former afford rules as to what shall be deemed clouds on title, the Circuit Courts, in the exercise of chancery jurisdiction, may remove such clouds. *Ib.*

177. (July, 1858.) The jurisdiction of the Circuit Court in equity is limited to certain persons and matters, but within those limits it can confer a remedy, when a plain, adequate, and complete one cannot be had at law. In the exercise of its equity jurisdiction within those limits, it can afford relief where it can be afforded by the principles of the High Court of Chancery in England. *United States v. Parrott*, McAll. 271.

178. Mere insolvency, if inconsiderable, would not give jurisdiction to the court; but where the amount is great, and the inability of the party to respond is greatly disproportioned to that amount, such insolvency would be an element to influence the action of the court, and, where it exists, is proper subject for an allegation in the bill. *Ib.*

179. (July, 1858.) The right sought in this case is equitable, — the removal of a cloud from title, and should therefore have been enforced on the equity side of this court. *Loring v. Downer, McAll.* 360.

180. (Dec., 1868.) The jurisdiction of a court of equity to remove a cloud upon title to real property, is confined to instances where the instrument or proceeding complained of appears to be valid on its face, but is in fact void or invalid, for some reason or matter which can only be shown by extrinsic evidence; but *semble* that such court has jurisdiction to prevent a cloud being cast upon title to real property, without reference to the fact whether such instrument or proceeding appears to be valid on its face or not. *Coulson v. City of Portland, Deady*, 481.

181. A court of equity has jurisdiction to enjoin a municipal corporation from committing a breach of trust concerning property or franchises held by it for the inhabitants thereof; but an ordinance providing for levying a tax is an exercise of legislative power, in the enactment of which such corporation acts not as a trustee, but as a local government, exercising a portion of the supreme power of the state. *Ib.*

182. A court of equity will enjoin a municipal corporation from unlawfully issuing interest coupons payable through a period of twenty years, and levying a tax for the payment thereof, upon the complaint of an owner of property liable to such tax, so as to prevent a multiplicity of suits. *Ib.*

183. A court of equity has no power to restrain a municipal corporation in the disposition or management of taxes collected under a void ordinance, on the complaint of a single property-holder therein. *Ib.*

184. (Sept., 1876.) [This was a suit in equity to set aside and annul the decree of the District Court of the Southern District of California, confirming a land claim of Mexican origin.]

If the bill showed that the decree had been procured by fraud of the grossest character, the Circuit Court would still be without jurisdiction; for it has no authority to pass upon the propriety of the decree, *i. e.*, to decide upon the validity of the claim, nor to remand the cause to any other forum where that question may be determined. *United States v. Flint*, 4 Sawyer, 43.

185. (Sept., 1879.) A bill may be filed on the equity side of the Circuit Court, against an administrator, to recover assets

which he has fraudulently withheld; and a final settlement of such administrator's accounts by a probate court will be no bar to the suit. *Van Bokkelen v. Cook*, 5 Sawyer, 587.

186. If assets in a foreign jurisdiction come into the possession of an administrator by a voluntary delivery to him, he may be required to account for them in the home jurisdiction. *Ib.*

Jurisdiction. Union of Legal and Equitable Causes not Lawful.

1. (Jan., 1842.) It is not perceived why a court of law should regard a resulting trust more than any other equitable rights; and any attempt to give effect to these rights at law, through the instrumentality of a jury, must lead to confusion and uncertainty. Equitable and legal jurisdictions have been wisely separated; and the soundest maxims of jurisprudence require each to be exercised in its appropriate sphere. *Watkins v. Holman*, 16 Pet. 26.

2. (Oct., 1879.) In the courts of the United States, the union of equitable and legal causes of action in one suit is forbidden by the second section of the Process Act of May 8, 1792 (1 Stat. 276), which is substantially re-enacted in sect. 913, Rev. Stat. *So held*, in a case removed, under the act of Congress, to the Circuit Court from a court of Texas, where such a union is, by the laws of that state, allowed. *Hurt v. Hollingsworth*, 10 Otto, 100.

Jurisdiction in Equity. Remedy at Law.

1. (Feb. 1812.) Where the only ground of equitable jurisdiction is the discovery of facts solely within the knowledge of the defendant, and the defendant discloses no such facts, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the plaintiff should be dismissed from the court of chancery and permitted to assert his rights in a court of law. *Russell v. Clark*, 7 Cranch, 69.

2. (1818.) The remedies in the courts of the United States, at common law and in equity, are to be, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles. *Robinson v. Campbell*, 3 Wheat. 213.

3. (Feb., 1826.) In general, the validity of a patent for lands

can only be impeached for causes anterior to its being issued in a court of equity. But where the grant is absolutely void, as where the state has no title, or the officer has no authority to issue the grant, the validity of the grant may be contested at law. *Patterson v. Winn*, 11 Wheat. 380.

4. (Jan., 1828.) A court of chancery is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law. *Horsburg v. Baker*, 1 Pet. 232.

5. (Jan., 1847.) The creditor of a partnership may, at his option, proceed at law against the surviving partner, or go, in the first instance, into equity against the representatives of the deceased partner. It is not necessary for him to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate of the deceased. *Nelson v. Hill*, 5 How., 127.

6. (Dec., 1862.) Where a party brings a bill in equity, complaining of an injury for which he has a plain, complete, and adequate remedy at law, the bill must be dismissed. *Parker v. W. L. C. & W. Co.*, 2 Black, 545.

7. In the courts of the United States, such an objection goes to the jurisdiction of the forum, and may therefore be enforced by the judges *sua sponte*, though not raised by the pleadings or suggested by the counsel. *Id.*

8. (Dec., 1868.) The fact that a creditor has a remedy at law against a principal debtor does not prevent him, after the issue in vain of execution against such principal, from proceeding in equity against a guarantor. *Railroad Co. v. Howard*, 7 Wall. 393.

9. (Dec., 1872.) A municipal corporation, obligors in a bond, cannot ask relief in equity, that the obligee be enjoined from proceeding at law, and that the bond be surrendered, when it alleges that the bond was issued without authority, in violation of law and in fraud of the town; that the obligee knew this when he took it; that the obligee's possession is merely colorable, and that he gave no value for it, and never had any right or title to the bond. Such allegations show a complete defense to the bond at law; and a judgment against the obligee at law would give as full protection every way to the obligor as a decree in equity. *Grand Chute v. Winegar*, 15 Wall. 373.

10. (Oct., 1874.) A bill in equity is not the proper means to

recover possession of land, there being no fraud in the case, nor other matter specially the subject of equitable cognizance; and a party cannot, by any colorable suggestion of fraud, account, &c., use such a bill in place of the common-law remedy of ejectment. The court will look at the proofs, and if there be no proof at all of the matters which would make a proper case for equity, it will disregard them, and look at the bill simply in its aspect of one to recover land of which the complainant is out of possession. *Lewis v. Cocks*, 23 Wall. 466.

11. If the bill is clearly one of the sort above spoken of, it is the duty of the court, *sua sponte*, and though there be no demurrer, plea, or answer setting it up, to recognize the fact and give to it effect. *Ib.*

12. (Oct., 1878.) A court of equity is the proper tribunal to ascertain the proportion of indebtedness chargeable to a stockholder of a bank on his personal liability. But as by the law of the State [of Georgia], as declared by its highest tribunal, an action of debt will lie where the amount of the bank's outstanding indebtedness and the number of shares held by the stockholder are known and can be stated, the extent of his liability in such cases being fixed, and the amount with which he should be charged being a mere matter of computation, a similar action at law will be sustained in such cases in the Circuit Court of the United States. *Mills v. Scott*, 9 Otto, 25.

13. (Oct., 1878.) Whenever a statute grants a new right, or a new remedy for the violation of an old right, or whenever such rights and remedies are dependent on state statutes or on acts of Congress, the jurisdiction, as between the law side and the equity side of the federal courts, must be determined by the essential character of the case. Unless it comes within some of the recognized heads of equitable jurisdiction, the remedy of the party is at law. *Van Norden v. Morton*, 9 Otto, 378.

14. (June, 1822.) A court of law has concurrent jurisdiction with a court of equity, to sustain a suit to enforce such a bond [the obligor having practiced fraud and imposition]. *United States v. Spalding*, 2 Mason, 478.

15. (Oct., 1836.) The equity jurisdiction of the courts of the United States is independent of the local law of any state, and is the same in nature and extent as the equity jurisdiction of England, from which it is derived. Therefore, it is no objection

to this jurisdiction, that there is a remedy under the local law. *Gordon v. Hobart*, 2 Sumn. 401.

16. (Oct., 1836.) Matters may be inquired into under a bill in equity, notwithstanding they are open at law, where the bill is brought for other purposes, as for a discovery, an injunction to stay proceedings at law, and for other general relief upon the merits, which a court of law is incompetent to administer. *Gass v. Stinson*, 2 Sumn. 454.

17. (Oct., 1843.) In matters of account, courts of equity possess a concurrent jurisdiction with courts of law, in most, if not all, cases; and where the case is one wherein a court of law could not afford an adequate redress, it is proper for the interposition of a court of equity. *Mitchell v. G. W. Milling & Mfg. Co.*, 2 Story, 648.

18. (May, 1844.) A court of equity will not maintain a bill for redress, in cases of loss or injury occurring to a principal, from the negligence or misconduct of his agent. The appropriate remedy is at law, for damages. *Vose v. Philbrook*, 3 Story, 336.

19. (May, 1855.) A court of equity cannot order the complainant and his sureties on an injunction bond, to pay the damages sustained by reason of the injunction. The defendant must resort to an action on the bond. *Merryfield v. Jones*, 2 Curt. C. C. 306.

20. (Oct., 1855.) If the law of the state has provided for relief at law, in the state courts, which equity alone could previously give, this does not affect the equitable jurisdiction of the courts of the United States. *Cropper v. Coburn*, 2 Curt. C. C. 465.

21. (May, 1874.) Courts of equity have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts, in matters of contract. *Gindrat v. Dane*, 4 Cliff. 260.

22. But where the cause of action is a purely legal demand, and the defense at law may be set up as complete as in equity, a suit in equity will not be sustained. *Ib.*

23. Such a case is controlled by sec. 16 of the Judiciary Act. *Ib.*

24. (Sept., 1867.) The provision of the sixteenth section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 82), that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete

remedy may be had at law, is merely declaratory, and does not exclude the courts of the United States from any part of the field of equitable remedies. *Bunce v. Gallagher*, 5 Blatchf. 481.

25. A suit in equity to annul a forged deed of land and have it cancelled, and the record of it declared void, brought by the legal owner of the land, who is the grantor named in the forged deed, while he is out of possession of the land, is not taken out of equitable jurisdiction by the fact that the deed is void. *Ib.*

26. Such a suit is peculiarly one of equitable cognizance. *Ib.*

27. (Nov., 1867.) In order to deprive a court of the United States of jurisdiction in equity, because the remedy at law is plain, adequate, and complete, the remedy at law must be as efficient to the ends of justice, and its complete and prompt administration, as the remedy in equity. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525.

28. A case of irreparable injury to the plaintiff, and one where no such injury can be produced to the defendant, is one eminently of equity jurisdiction. *Ib.*

29. (April, 1823.) It is not sufficient to oust the jurisdiction of the equity side of the court, that the plaintiff has a remedy on the common-law side, unless it appear that such remedy be adequate and complete to the object of the suit. *Mayer v. Foulkrod*, 4 Wash. 349.

30. Although a legatee has a remedy at common law, by the law of Pennsylvania, this does not oust the equity jurisdiction of the Circuit Courts of the United States. To effect that, the common-law side of *those courts* must be able to afford full, complete, and adequate remedy. *Ib.*

31. The thirty-fourth section of the Judiciary Act applies only to the *rights* of persons and of property, and in those cases, the state laws furnish rules of decision, which the federal courts must observe. But as to remedies and modes of proceeding at *common law*, they are fixed by the act of the 8th of March, 1792, ch. 37, to be such as were then used in those courts, in conformity with the act of the 24th of September, 1789. *Ib.*

32. If a state law shall declare that to be a legal title, which without such a declaration would be considered only an equivalent one, the federal courts may afford a common-law remedy to

enforce it, but without excluding the equitable jurisdiction of the court, in a case proper for it. *Ib.*

33. (Oct., 1827.) Courts of common law and equity have concurrent jurisdiction in cases of fraud. *Lessee of Rhoades et al. v. Selin*, 4 Wash. 716.

34. (Oct., 1831.) If the plaintiff has a plain, adequate, and complete remedy at law, the case is not a suit in equity, under the Constitution or the Judiciary Act. *Baker v. Biddle*, Baldw. 394.

35. Equity has cognizance only of executory trusts, not of those executed, or where a trust can be enforced at law; there must be some act to be done by the trustee. *Ib.*

36. (May, 1836.) It is a general principle of equity, that wherever a party has a perfect remedy at law, he cannot come into a court of equity to enforce his rights; some defect in the legal remedy being the very foundation of the equitable jurisdiction. But where, superadded to this legal remedy, a trust is expressly created, either by the deed of the parties, or by the operation of law, or both, a court of equity has a concurrent jurisdiction with the court of law; and the party may proceed, at his option, either to enforce his legal security, or may come into equity to enforce the trust. *United States v. Myers*, 2 Brock. 516.

37. Although a court of equity will not interfere to adjust equities between a debtor defendant and *his* debtor, upon a bare possibility that a resort may ultimately be had to the latter, yet, where the foundation of the suit is a trust, and the trust subject is distributed among several, the *cestui que trust* has a right to call for an account of the trust subject, in whatever hands it may be found. *Ib.*

38. (April, 1871.) If fraud is charged against executors in proving a will, and acting under it, and notice of such fraud before their purchase of the property is alleged against the other defendants, a suit at law could not give adequate relief. *Gaines v. Mausseaux et al.*, 1 Woods, 118.

39. (April, 1872.) When every part of a contract has been executed except the payment of money, the remedy at law (if one exists), is fully adequate to the case; for, by an action at law, it is precisely the unpaid money which is recovered, with, perhaps, damages for its detention. *Heine v. The Levee Commissioners*, 1 Woods, 246.

40. A court of equity has general jurisdiction of liens, inasmuch as a court of law cannot, except by execution, order a sale of the property which is subject to the lien, and cannot conveniently distribute the proceeds to those who may be entitled thereto. *Ib.*

41. (April, 1857.) If there is no sufficient ground for the allowance of an injunction, and the case is to be viewed as a mere proceeding to recover compensation for an infringement of the exclusive right of the complainant, there would seem to be an adequate remedy at law, which would render the interposition of a court of equity improper. *Jenkins v. Greenwald*, 1 Bond, 126.

42. (Dec., 1860.) It is not enough to defeat jurisdiction in equity that there was a remedy at law; the remedy must be complete, prompt, and efficient. *Crane v. McCoy*, 1 Bond, 422.

43. If the rights of a party can only be enforced at law by long-continued, strenuous, and expensive litigation, and those rights can be more promptly and efficiently asserted in equity, a stringent reason is offered for the application of its power. *Ib.*

44. (Oct., 1869.) As the case in equity between these parties was appealed to the Supreme Court, and the decision of that court was that the plaintiffs' remedy was by action at law, and that the case must be remanded to this court for trial at law, the plaintiffs' right thus to sue cannot be controverted. *Railroad v. Thompson*, 2 Bond, 296.

45. (June, 1845.) A county is made subject to a suit by an act of the State of Michigan. At common law a county was not liable to a suit.

On a judgment being obtained against the county, the supervisors are required to levy the amount on the people of the county. And if they fail to do this, a *mandamus* may be issued to compel them. *Lyell v. St. Clair County*, 3 McLean, 580.

46. This is a common-law remedy, but the object of this bill is to subject certain bonds and mortgages to the satisfaction of the judgments which cannot be reached by *mandamus*. The remedy at law, therefore, is not adequate. *Ib.*

47. A creditor's bill may be filed against a county. *Ib.*

48. No objection is perceived why an execution may not be levied on the property of a county. *Ib.*

49. (April, 1851.) Where a case was properly examinable at law, and a trial at law has been had, and no exception to the

ruling of the court, chancery can give no relief. *Hendrickson v. Hinkley*, 5 McLean, 211.

50. Chancery cannot revise a case at law, where there was no obstruction to a full investigation of the merits. *Ib.*

51. Even if a party neglects to make a full defense, as might have been done, it is no ground for the exercise of an equitable jurisdiction. *Ib.*

52. (April, 1851.) If in the various transfers made, it may be doubtful whether an action at law can be maintained, it affords a ground for the exercise of chancery jurisdiction. *Bicknell & Jenkins v. Todd*, 5 McLean, 236.

53. (Aug., 1874.) The remedy of the *cestui que trust* against the trustee, for negligence, must be in equity, not at law. *Hukill v. Page*, 6 Biss. 183.

54. (July, 1855.) Courts of law and courts of equity have concurrent jurisdiction in matters of fraud in many cases. *Seabury v. Field*, McAll. 60.

Jurisdiction. Mandamus.

1. (Feb., 1803.) A *mandamus* is the proper remedy to compel a Secretary of State to deliver a commission to which the party is entitled. *Marbury v. Madison*, 1 Cranch, 137.

2. (March, 1813.) The power of the Circuit Courts of the United States to issue the writ of *mandamus* is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. *McIntire v. Wood*, 7 Cranch, 504.

3. (Dec., 1850.) Where the United States were the plaintiffs, and a verdict was rendered that they were indebted to the defendant, and an application was made for a *mandamus*, to compel the Secretary of the Treasury to credit the defendant upon the books of the treasury with the amount of the verdict, and to pay the same, the *mandamus* was properly refused by the Circuit Court. For a *mandamus* will only lie against a ministerial officer to do some ministerial act where the laws require him to do it, and he improperly refuses to do so. *Reeside v. Walker*, 11 How. 272.

4. (Dec., 1860.) Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons as they become due, and, having issued such bonds, they neglect or refuse to assess the

tax to pay the interest, a writ of *mandamus* is the proper legal remedy. *Commissioners of Knox Co. v. Aspinwall*, 24 How. 376.

5. The Circuit Courts of the United States have authority to issue such writ of *mandamus* against the commissioners, where it is necessary, as a remedy for suitors in such court. *Ib.*

6. It is not a sufficient reason for setting aside a peremptory *mandamus*, that a previous alternative writ had not issued. *Ib.*

7. (Dec., 1866.) On application by a creditor for *mandamus* against county officers, to levy a tax to pay a judgment, the defendant cannot impeach the judgment by setting up that interest was improperly given in it. This would be to impeach it collaterally. *Supervisors v. United States*, 4 Wall. 435.

8. (Dec., 1866.) Where a statute has authorized a municipal corporation to issue bonds, and to exercise the power of local taxation, in order to pay them, and persons have bought and paid value for bonds issued accordingly, the power of taxation thus given is a contract, within the meaning of the Constitution, and cannot be withdrawn until the contract is satisfied. The state and the corporation, in such a case, are equally bound.

A subsequently passed statute which repeals or restricts the power of taxation so previously given, is, in so far as it affects bonds bought and held under the circumstances mentioned, a nullity.

It is the duty of the corporation to impose and collect the taxes in all respects as if the second statute had not been passed.

If it does not perform this duty, a *mandamus* will lie to compel it. *Von Hoffman v. City of Quincy*, 4 Wall. 535.

9. (Dec., 1867.) After judgment at law for a sum of money, against a municipal corporation, and execution returned unsatisfied, *mandamus*, not bill in equity, is the proper mode to compel the levy of a tax, which the corporation was bound to levy to pay the judgment. *Walkley v. City of Muscatine*, 6 Wall. 481.

10. (Dec., 1868.) A return to a *mandamus* ordering a municipal corporation forthwith to levy a specific tax upon the taxable property of a city, for the year 1865, sufficient to pay a judgment specified, collect the tax and pay the same, or show cause to the contrary by the next term of the court, is not answered by a return that the defendants "in obedience to the order of the court, did proceed to levy a tax of one per cent upon the taxable property of the said city, for the purpose of paying the judgment

named in the information, and *other claims*, and that the said tax is sufficient in amount to pay the said judgment and other claims, for the payment of which it was levied." The return should have disclosed the whole act constituting the levy, so as to enable the court to determine whether it was sufficient to pay the judgment of the relator. It was also erroneous, in returning that the tax was levied to pay this judgment "and *other claims*." *Benbow v. Iowa City*, 7 Wall. 313.

11. (Dec., 1869.) A *mandamus* directed to the mayor and aldermen of a city is rightly enough directed, if it appears that they together constitute the city council and have the government of it, even although the city may be incorporated by the name of "the city of —," and by that name have power under the charter to sue and be sued. *The Mayor v. Lord*, 9 Wall. 409.

12. When a creditor has a judgment at law for a debt against a city, on the city bonds, the city cannot set up in defense to an application for *mandamus*, that the bonds were not sanctioned by a requisite popular vote. *Ib.*

13. An injunction from a state court, against a city's levying a tax to pay certain bonds of the city, cannot be set up to prevent a *mandamus* from the federal courts, ordering the city to levy a tax to pay a judgment obtained against it on those same bonds. *Riggs v. Johnson County* (6 Wall. 106), affirmed. *Ib.*

14. A recital in an alternative *mandamus* to a city to levy and collect a tax, in a coming year, on the real cash valuation of its property for that year (stating the value), that property in the city is subject to taxation at such real cash valuation, but that its assessed valuation had never exceeded one half of that valuation, and that the mayor and aldermen were authorized by the city charter to correct the valuation when erroneous, and that they had hitherto neglected to perform that duty, is not traversed by a denial that the valuation never exceeded half the cash value, and an averment that the city council always performed its duty in respect to correcting erroneous assessments. *Ib.*

15. (Dec., 1871.) The Circuit Courts of the United States have no power to issue writs of *mandamus* to state courts, by way of original proceeding, and where such writ is neither necessary nor ancillary to any jurisdiction which the court then had. *Bath County v. Amy*, 13 Wall. 244.

16. Hence such writ, on error here, was held to have been wrongly granted in favor of a holder of county bonds, to make the county levy a tax ; the creditor not having obtained judgment in the Circuit Court on his claim, nor even put it into suit. *Ib.*

17. (Dec., 1872.) Where, under the forty-first section of the Bankrupt Act of 1867, a trial by jury is had in the District Court, in a case of application for involuntary bankruptcy, and exceptions are taken in the ordinary and proper way, to the rulings of the court, on the subject of evidence, and to its charge to the jury, a writ of error lies from the Circuit Court, when the debt or damages claimed amount to more than \$500 ; and if that court dismiss, or declines to hear the matter, a *mandamus* will lie to compel it to proceed to final judgment. *Insurance Co. v. Comstock*, 16 Wall. 258.

18. (Oct., 1876.) In such case [where officers' terms of office have expired, and there cannot be a new election] if there be a judgment against the corporation, *mandamus* will not lie to enforce the assessment of taxes for its payment, there being no officers to whom the writ can be directed. *Barkley v. Levee Commissioners*, 3 Otto, 258.

19. The court cannot, by *mandamus*, compel the new corporations to perform the duties of the extinct corporation in the levy of taxes for the payment of its debts, especially where their territorial jurisdiction is not the same, and the law has not authorized them to make such levy. *Ib.*

20. (Oct., 1878.) A county in Kansas is a body politic, whose powers are exercised by a board of county commissioners ; and when it is sued, process must be served upon the clerk of the board. Where, therefore, a *mandamus* was awarded against it, *Held*, 1. That the writ was properly directed to it in its corporate name. 2. That service of a copy of the writ upon the clerk is service upon the corporation ; and the members of the board who fail to perform the required act are subject to be punished for contempt. *Commissioners v. Sellow*, 9 Otto, 624.

21. (Oct., 1880.) After making a return to the alternative *mandamus* sued out against him by a judgment creditor of a township, the township supervisor cannot set up the non-service of any notice in the cause. *Edwards v. United States*, 13 Otto, 471.

22. (Oct., 1880.) To a petition for a *mandamus* to compel A., the clerk of a township, to whom had been delivered a certified copy of a judgment recovered against it, to certify the judgment to the supervisor in order that the amount thereof might be placed upon the tax-roll, A. made answer, among other things, that he had resigned his office before the copy was served upon him. *Held*, that evidence that the township board had, after the cause was at issue, appointed his successor, was properly excluded.

Such an appointment after the institution of the proceedings, should, if available as a matter of defense, have been set up by a plea *puis darrein continuance*, or its equivalent. *Thompson v. United States*, 13 Otto, 480.

23. (Oct., 1847.) A *mandamus* to a court implies some censure on it as well as on the party, and is, therefore, not to be issued where there has been, to appearance, an honest exercise of a discretion confided to it by law. *Ladd v. Tudor*, 3 Woodb. & M. 326.

24. *Quere*, if it lies from courts of the United States to judges of state courts. *Ib.*

25. (Sept., 1825.) The Circuit Courts have no supervising power or control over the District Courts, other than is given by the laws of the United States; which is to compel a rendition of a judgment or decree, and to re-examine it on error or appeal. *Smith v. Jackson*, 1 Paine, 453.

26. The Circuit Courts have no power to issue writs of *mandamus* after the practice of the King's Bench, but only where they are necessary for the exercise of their jurisdiction. *Ib.*

27. As where a District Court refuses to give judgment, a *mandamus* lies to compel it. *Ib.*

28. But a *mandamus* will not lie to a District Court to compel it to expunge amendments improperly made in the record returned to the Circuit Court on a writ of error. *Ib.*

29. (April, 1869.) No *mandamus* from a court of the United States to a state court is necessary to enforce affirmative action by a state court, to allow a cause to be removed in an ordinary case of the removal of a cause before judgment; and therefore, a court of the United States has no jurisdiction to issue such *mandamus*. *Fisk v. Union Pacific Railroad Co.*, 6 Blatchf. 362.

30. (April, 1855.) The Circuit Court has no power to issue a

mandamus to the District Court, to compel it to set aside its decree in admiralty, or to grant a rehearing, or to allow an appeal after the time has elapsed in which it might have been taken ; not even in cases where this court thinks that the District Court should have reheard the case, or allowed an appeal under the circumstances. *The Enterprise & The Napoleon*, 3 Wall. Jr. 58.

31. (Oct., 1858.) Whether a *mandamus* may issue from the Circuit Court to the state court to compel it to send a cause from its jurisdiction into the federal, the point raised but not decided ; no objection to such power, however, being taken at the bar. *Ex parte Turner*, 3 Wall. Jr. 258.

32. (June, 1874.) Where money in a state treasury, devoted by the state constitution to the payment of a particular indebtedness, has been applied by direction of the state legislature to another purpose, and afterwards, money comes into the state treasury, which a public creditor, who was entitled to the money first unapplied, seeks to have paid to himself in discharge of his claim,—*Held*, that although a court of chancery might properly have enjoined the state treasurer from the original misapplication on bill filed in time, yet that it has no power after the misapplication to restrain the state treasurer from applying to the general purposes of the state subsequently received moneys not especially dedicated by law, nor to compel the treasurer by *mandamus* to substitute such general funds for the moneys already improperly paid. *Self v. Jenkins*, 1 Hughes, 23.

33. (Dec., 1862.) The power of the United States Circuit Courts to issue the writ of *mandamus* is confined to those cases in which it may be necessary to the exercise of their jurisdiction ; and therefore such court may entertain a bill in chancery in cases where *mandamus* would be an ample remedy in a state court, if it is not a necessary remedy in the United States Court. *City of Wheeling v. Mayor of Baltimore*, 1 Hughes, 90.

34. (April, 1872.) If officers who are charged with the duty of laying or collecting taxes refuse to perform their functions, the courts, in a clear case of failure, and at the instance of a party directly interested, can, by the prerogative writ of *mandamus*, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary. *Heine v. The Levee Commissioners*, 1 Woods, 246.

35. (April, 1876.) The purpose of the writ of *mandamus* is

to enforce, not to create, legal duties. *United States ex rel. Ranger v. City of New Orleans*, 2 Woods, 230.

36. It will not issue to compel officers of municipal corporations to levy and collect a tax, unless the legislature has either expressly or by implication made it the duty of such officers to levy and collect such tax. *Ib.*

37. (April, 1874.) Upon an application for the peremptory writ of *mandamus* to compel a court of county commissioners to assess and collect a tax, to pay off a judgment recovered in a federal court against them, no matter can be set up against the application which was properly used as a defense against the recovery of the judgment. *Clews & Co. v. County of Lee*, 2 Woods, 474.

38. Nor will it be a reason why the writ should not be granted, that the court of county commissioners has been enjoined from the assessment and collection of the tax by a state court. The effect of the case of *The Supervisors of Carroll County v. The United States*, 18 Wall. 71, considered. *Ib.*

39. (May, 1875.) Plaintiffs who had recovered a judgment against the county of Tallapoosa on coupons detached from bonds which the board of county commissioners were authorized to issue, and to pay which the law made it their duty to levy and collect a tax, are entitled to the writ of *mandamus* to compel said commissioners to levy and collect the tax, notwithstanding the fact that, in a proceeding in equity (to which said plaintiffs were not parties), the chancery court had, before the recovery of said judgment, issued an injunction restraining the county commissioners from the levy and collection of any tax to pay said indebtedness, and said injunction still remained in force. *Smith & Co. v. Commissioners of Tallapoosa County*, 2 Woods, 596.

40. (Jan., 1864.) The United States Circuit Court has no power to issue a writ of *mandamus* to a state court for the removal of a cause. Congress undoubtedly could give them such power; but it has not done so. *Hough v. Western Transportation Co.*, 1 Biss. 425.

41. (Jan., 1869.) A writ of *mandamus* is the proper process against a board of supervisors to compel the levy of a tax and payment of a judgment obtained against the county in this court. *Thompson v. Lee County*, 2 Biss. 77.

42. To a writ of *mandamus* issuing from this court, it is not a

sufficient answer that the respondents had been enjoined by a state court from doing the act which the writ of *mandamus* commanded. *Ib.*

43. (July, 1869.) The United States Circuit Court has no power to issue a writ of *mandamus* to compel the removal of a cause from a state court. *In re Cromie*, 2 Biss. 160.

44. The act of July 27, 1866, made no change in this respect. *Ib.*

45. (Jan., 1871.) The fact that the total revenue of a city is used in defraying its current expenses does not constitute a legal or sufficient excuse for not paying its maturing indebtedness.

They have no right to spend their income in this way, leaving their bonds, and other debts unpaid; but are bound to provide for and pay the latter, and, on failure or refusal, this court will, by *mandamus*, compel them so to do. *Van Northwick v. City of Stirling*, 2 Biss. 408.

46. (Jan., 1869.) A writ of *mandamus* against a board of supervisors, whether alternative or peremptory, should be served upon the individual members. An acceptance by the clerk, although "by order of the board," is not sufficient. *Downs v. Board of Supervisors*, 4 Biss. 508.

47. (Feb., 1875.) Where town officers had resigned in order to avoid auditing and paying a judgment against the town, it is not a sufficient return to an alternative writ of *mandamus*, that the respondents, the officers, had resigned. If it does not also appear that their successors have been elected or appointed, and qualified, they will be ordered to audit the judgment. And it seems that they may be ordered to hold a special meeting for that purpose. *United States ex rel. &c. v. Chester Badger et al.*, 6 Biss. 308.

48. (Oct., 1868.) The chapter on the "action by *mandamus*," of the Revised Code of Iowa, changes the character of the writ to an action for the enforcing of any right to which it may be applicable. This chapter has never been adopted by this court as a rule of practice, and can have no force here. *Rusch v. Supervisors*, Woolw. 313.

49. This court, in applications for *mandamus*, has always proceeded according to the course of the common law. *Ib.*

50. (May, 1869.) When a *mandamus* is awarded, directed to a board of officers composed of several members, commanding

the performance of an official act by them as a board, and they do not obey it, but one writ of attachment should go against them for this contempt. *Durant v. Supervisors*, Woolw. 337.

51. If more than one writ is issued, and each is entered as a separate case, they will be consolidated. *Ib.*

52. (1873.) The Judiciary Act confers no jurisdiction on the Circuit Court to issue a writ of *mandamus* as an original proceeding; and the fifth section of the act of Congress of June 1, 1872, does not confer original jurisdiction in *mandamus* proceedings. *United States v. Union Pacific Railroad Co.*, 2 Dill. 527.

53. The act of June 1, 1872, does not have the effect to make the provisions of the state statutes relating to pleadings and practice in actions of *mandamus* applicable to the ancillary jurisdiction of this court in *mandamus* proceedings, but the practice of the court remains substantially as at common law. *Ib.*

54. The act of Congress of March 3, 1873, confers original jurisdiction on the proper Circuit Court of the United States of cases of *mandamus* to compel the Union Pacific Railroad Company to operate its road according to law. *Ib.*

55. (1874.) Under the act of Missouri of March 23, 1868 (Laws of 1868, p. 927), authorizing township aid to railways, the remedy of the owner of bonds was by *mandamus* to the county court to compel it to levy and collect the special tax, which the act provided as the means to pay the bonds and interest thereon. *Jordan v. Cass County*, 3 Dill. 185.

56. (1875.) A judgment creditor of a county, who has received a warrant on the treasurer, which is refused payment, may have a *mandamus* to enforce the collection of a tax to pay such judgment, and is not bound to wait and take his turn among other warrant-holders. *United States ex rel. &c. v. Vernon County*, 3 Dill. 281.

57. (1875.) The act of March 3, 1873 (17 Stat. 509), gives to the proper Circuit Court jurisdiction in *mandamus* to compel the Union Pacific Railroad Company to operate its road as required by law. There must be jurisdiction over the company by service upon it to enable the court to exercise the power conferred by the act. *Hall v. Union Pacific Railroad Co.*, 3 Dill. 515.

58. Whether the Circuit Court for the District of Iowa can acquire jurisdiction over the company, *quære*. *Ib.*

59. Private persons who suffer damage and inconvenience from the failure of the Union Pacific Railroad Company to operate its road as required by law, may institute proceedings in *mandamus*, under the act of March 3, 1873 (17 Stat. 509), without the sanction of the attorney-general. *Ib.*

60. (1875.) The Circuit Court of the United States for the District of Iowa, under the acts of Congress relating to the Union Pacific Railroad Company, has jurisdiction in *mandamus* to compel that company to operate its road as required by law if any part of the road is in the district of Iowa; and under the act of June 20, 1874, service of process may be made upon the president or general superintendent of the company found in the district of Iowa. *United States v. Union Pacific Railroad Co.*, 3 Dill. 524.

61. (1878.) The relators obtained in this court a judgment against a county, and a peremptory writ of *mandamus* issued commanding the respondent, as county judge [in Arkansas], to levy a tax to pay such judgment. He obeyed. Subsequently the state court, in a proceeding to which the relators were not parties, set aside the order for the tax levied by the respondent in obedience to the *mandamus*, and directed the respondent to enter an order on his records annulling the levy of the tax. The respondent obeyed. At the relators' instance a rule issued against the respondent to show cause why he should not be attached for contempt,—*Held*, that he was in contempt, and liable to be punished therefor. *United States v. Silverman*, 4 Dill. 224.

62. The order made in the case is given at the end of the opinion. *Ib.*

63. (1875.) Amendments in form and substance may be allowed in *mandamus* proceedings in any stage thereof, where justice will be thereby promoted. In this case the alternative writ was amended by leave of the court, by striking out part of its mandate, and the peremptory writ, instead of being denied because the alternative writ was too broad, was ordered to be issued in conformity to the alternative writ as amended. *United States v. Union Pacific Railroad Co.*, 4 Dill. 479.

64. (1878.) A judgment of the court upon the bonds of the county, issued in aid of a railroad company, may be enforced by *mandamus* to compel the levy and collection of taxes; or, if the

amount is already in the county treasury, applicable to such debts, to compel the county court to draw a warrant to pay the judgment. (See also cases in note.) Such a duty is not judicial. (*State v. Walker* commented on.) *United States ex rel. &c. v. Buchanan County*, 5 Dill. 285.

65. Where two out of three judges of the county court refused to obey a peremptory writ of *mandamus*, they were ordered to return the writ into court with a sworn return thereon, and also to show cause why they should not be attached for contempt. *Ib.*

66. (1878.) Where a statute authorizes a county to issue its negotiable bonds, and makes it the duty of the county court "to levy a special tax of sufficient amount to pay the interest and principal of said bonds as the same become due," it is the duty of the county court to levy and cause to be collected a tax sufficient in amount to pay the interest and principal of such bonds as the same mature; and if it does not perform this duty, it may be compelled to do so by *mandamus*. *United States ex rel. &c. v. Jefferson County*, 5 Dill. 310.

67. (April, 1880.) The jurisdiction of the Circuit Courts in *mandamus* proceedings is not enlarged by the act of 1875. *Telegraph Co. v. Telephone Co.*, 1 McCrary, 175.

Jurisdiction concurrent with State Court.

1. (May, 1838.) In cases of concurrent jurisdiction in the state court and the Circuit Court of the United States, the latter has no discretionary authority to stay or control the suit, or to refuse jurisdiction in order to prevent a collision between the two courts. *Wadleigh v. Veazie*, 3 Sumn. 165.

2. (Oct., 1838.) The Circuit Court has jurisdiction to aid in enforcing the judgment of a state court. *Wilson v. City Bank*, 3 Sumn. 423.

3. (May, 1845.) This court has ample power to entertain a cause over which the state court has jurisdiction, provided this court have full concurrent jurisdiction. *Tobey v. County of Bristol*, 3 Story, 800.

4. (June, 1852.) The Circuit Court has concurrent jurisdiction with the Probate Court, to decree an account in favor of distributees. *Mallett v. Dexter*, 1 Curt. C. C. 178.

5. (Feb., 1880.) In a suit against the administrator of an executor, by citizens of another state, to enforce the payment of a judgment obtained against the decedent in such state, during his lifetime, and subsequently sued upon in the Circuit Court for the District of Minnesota, and judgment obtained thereon against the executor of the decedent, such Circuit Court has concurrent jurisdiction with the Probate Court of the State of Minnesota in which the wills of the decedent and the deceased executor have both been probated. *Chapman v. Borer*, 1 McCrary, 49.

Jurisdiction. Place of Trial on Change of Boundaries of Districts.

1. (1878.) The act of Congress of Jan. 31, 1877, taking certain counties out of the Western District, and placing them in the Eastern District, of Arkansas, is silent as to cases then pending in the Western District against residents of these several counties. Such cases remain and are to be tried by the United States Court for the Western District. *Culver v. Woodruff County*, 5 Dill. 392.

2. Where the *status* of parties is such as to give a federal court jurisdiction, a change of such *status* pending the suit does not affect the jurisdiction. *Ib.*

Jurisdiction. Disputed Sovereignty.

1. (May, 1838.) Where a dispute exists between two independent countries, as to the right of sovereignty over a particular territory, the courts of justice of each country are bound to consider the claim of their own government as rightful, and are not at liberty to discuss the question, who is the rightful sovereign, it being a subject of political and diplomatic negotiation, and not of judicial cognizance. *Williams v. Suffolk Ins. Co.*, 3 Sumn. 270.

Jurisdiction. Matter in Dispute.

1. (April, 1796.) This was an action for an assault and battery committed on the high seas, and the damages were laid in the declaration at \$1,000; but the controversy being referred, the referees reported only \$45 in favor of the plaintiff. In April

term, 1795, M. Levy, for the defendant, obtained a rule to show cause why the report of the referees should not be quashed and the action dismissed.

BY THE COURT: That the sum or value of the object in controversy should amount to \$500 was deemed by the legislature a reasonable limit to the jurisdiction of this court; but the law has itself likewise provided the remedy against any transgression of that limitation, by declaring that the plaintiff who recovers less may be adjudged to pay costs. The very force of the expression vests a jurisdiction; since it would be impossible to *adjudge* that the plaintiff should pay costs, without taking cognizance of the cause.

But whatever distinction might be made in other respects, between suits instituted to recover a sum certain, and suits brought to recover damages for a tort, certain it is, that in the latter cases there can be no rule to ascertain the jurisdiction of the court but the value laid in the declaration. If the finding of the jury was the criterion, then the jurisdiction of the court would depend entirely on the verdict; and if a verdict in favor of the plaintiff, for less than \$500, would defeat the jurisdiction, a verdict against him must unquestionably be equally fatal.

We think, therefore, that the amount of the plaintiff's claim must be considered as the matter in dispute; and that upon a fair comparison and construction of the eleventh and twentieth sections of the Judicial Act, the mere finding of a jury, or of referees, upon the question of damages, cannot affect the jurisdiction of the court. *Hulsecamp v. Teel*, 2 Dall. 358.

2. (Aug., 1798.) In an action of debt on a bond for £100, the principal and interest are put in demand, and the plaintiff can recover no more, though he may lay his damages at £10,000. . . .

But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction. *Wilson v. Daniel*, 3 Dall. 401, 407.

3. (Jan., 1842.) It has often been decided that the sum in

controversy in a suit is the damages claimed in the declaration. If the plaintiff shall recover less than \$500, it cannot affect the jurisdiction of the court, a greater sum having been claimed in his writ. But in such case the plaintiff does not recover his costs ; and, at the discretion of the court, he may be adjudged to pay costs. *Gordon v. Longest*, 16 Pet. 97.

4. The damages claimed by the plaintiff in his suit give jurisdiction to the court, whether it be an original suit in the Circuit Court of the United States, or brought there by petition from a state court. *Ib.*

5. (April, 1803.) Action of covenant upon an agreement under seal, containing a penalty amounting to less than \$500. The Circuit Court has jurisdiction, the action being for damages exceeding \$500, as laid in the declaration. *Martin v. Taylor*, 1 Wash. 1.

6. (April, 1813.) If evidence has been given on the trial, that the value of the land in dispute exceeds \$500, although the jury in their verdict did not find that fact, the court will not grant a new trial. Evidence after verdict, by witnesses on affidavit, would be sufficient to fix the jurisdiction of the Circuit Court. *Den v. Wright*, Pet. C. C. 64.

7. (Oct., 1842.) Jurisdiction is taken from the damages laid in the writ and declaration, and not from the amount due, proved by the plaintiff. *Sherman v. Clark*, 3 McLean, 91.

8. (1873.) To give the Circuit Court jurisdiction, the matter in dispute must exceed \$500 ; and the amount in dispute is what is claimed in all the counts in the declaration, upon causes of action which are properly joined, and not what is claimed in any one count. *Judson v. Macon County*, 2 Dill. 213.

9. There is nothing in the act of June 1, 1872 (17 Stat. 191, sec. 5), or in the statutes of Missouri, so far as applicable to the Circuit Court, to change the above rule. Hence a declaration with eleven counts, each count being upon a distinct coupon for \$50, shows a case, as to amount, within the jurisdiction of the Circuit Court. *Ib.*

Jurisdiction. An Alien a Party.

1. (Feb., 1800.) When one party is an alien, the other must be a citizen. In proceedings in a federal court, in equity, to

foreclose, it is as necessary to describe the parties, as in any other suit. *Mossman v. Higginson*, 4 Dall. 12, 14.

2. (Feb., 1805.) *Quere*: Whether the courts of the United States have jurisdiction in cases between aliens. *Bailiff v. Tipping*, 2 Cranch, 406.

The only question in this case would have been, whether one alien could sue another alien in the courts of the United States. The Circuit Court for the Kentucky district was of opinion that they had no jurisdiction in such a case. *Ib.*

3. (Feb., 1807.) When both parties are aliens, the courts of the United States have not jurisdiction. *Montalet v. Murray*, 4 Cranch, 46.

4. (Feb., 1808.) Error assigned: 2. That the court had not jurisdiction, because, although the bill states the complainants to be French citizens, and the defendant a citizen of Georgia, yet the two testators were citizens of Georgia.

MARSHALL, Ch. J. The present impression of the court is, that the case is clearly within the jurisdiction of the courts of the United States. The plaintiffs are aliens, and although they sue as trustees, yet they are entitled to sue in the Circuit Court. *Chappedelaine v. Dechenaux*, 4 Cranch, 305, 308.

5. (Feb., 1809.) The courts of the United States have jurisdiction in a case between citizens of the same state, if the plaintiffs are only nominal plaintiffs, for the use of an alien. *Browne v. Strode*, 5 Cranch, 303.

6. (Feb., 1809.) Although the plaintiff be described in the proceedings as *an alien*, yet the defendant must be expressly stated to be a *citizen* of some one of the United States. Otherwise the courts of the United States have not jurisdiction in the case. *Hodgson v. Bowerbank*, 5 Cranch, 303.

7. (Jan., 1829.) The eleventh section of the act of 1789 must be construed in connection with, and in conformity with, the Constitution of the United States. By this latter, the judicial power does not extend to private suits in which an alien is a party, unless a citizen be the adverse party; and it is indispensable to aver the citizenship of the defendants, to show, on the record, the jurisdiction of the court. *Jackson v. Twentyman*, 2 Pet. 136.

8. (Jan., 1829.) The suit was originally instituted by aliens and a citizen of the United States as complainants, against the defendants, citizens of the United States. In the progress of

the cause, and before the final hearing, the name of the citizen of the United States, who was one of the plaintiffs, was struck out, and he was made a defendant by the court. It was held : the substantial parties, plaintiffs, those for whose benefit the decree is sought, are aliens, and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction by uniting with themselves a person between whom and one of the defendants the court could not take jurisdiction : strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed between the alien parties and all the citizen defendants. There is no objection founded on convenience or law to this course. *Conolly v. Taylor*, 2 Pet. 556.

9. (Jan., 1833.) The plaintiffs, aliens, were residents of the State of Louisiana at the time of the execution of the note sued on in the District Court of the United States for the Eastern District of Louisiana, and continued to reside in New Orleans since, having a commercial house there ; they are, however, absent six months in the year ; but when absent, have their agent to attend to their business. The defendants in the suit were residents of the city of New Orleans, and citizens of the State of Louisiana, when the note was given. The residence of aliens within the state constitutes no objection to the jurisdiction of the federal court. *Breedlove v. Nicolet*, 7 Pet. 413.

10. If originally aliens, they did not cease to be so, or lose their right to sue in the federal court, by a residence in Louisiana. Neither the Constitution nor the acts of Congress require that aliens should reside abroad, to entitle them to sue in the courts of the United States. *Ib.*

11. (Jan., 1835.) The plaintiffs instituted a suit in the Circuit Court of the United States for the District of Maryland, stating themselves to be citizens of the State of Maryland, and that the defendant was an alien, and a subject of the King of Spain. The defendant pleaded in abatement that one of the plaintiffs, Domingo D'Arbel, was not a citizen of Maryland, nor of any of the United States, but was an alien, and a subject of the King of Spain. Upon the trial of the issue joined on this plea, the plaintiffs produced and gave in evidence, under the decision of the Circuit Court, a passport granted by the Secretary of State of the United States, stating D'Arbel to be a citizen of

the United States. *Held*, that the passport was not legal evidence to establish the fact of the citizenship of the person in whose favor it was given. *Urtetiqui v. D'Arbel et al.*, 9 Pet. 692.

12. The defendant in the Circuit Court offered in evidence the record, duly certified, of the District Court of the United States for the District of Louisiana, containing the proceedings in a suit which had been originally instituted against D'Arbel, in a state court of Louisiana, and on his affidavit that he was an alien, and a subject of the King of Spain, had been removed for trial to the District Court, under the authority of the act of Congress authorizing such a removal of a suit against an alien into a court of the United States. The record was introduced as containing a copy of the affidavit of D'Arbel in the state court, upon which the case was removed. *Held*, that this was legal evidence. *Ib.*

13. (Dec., 1851.) Where there was a sale of an undivided moiety of a tract of land, and the purchaser undertook to extinguish certain liens upon it, which he failed to do; and in consequence of such failure the liens were enforced, and had to be paid by the heirs of the original owner, a suit by these heirs against the purchaser to recover damages for the non-fulfilment of his contract to extinguish the liens was not within the prohibition of the eleventh section of the Judiciary Act (1 Stat. at Large, 78). The heirs, being aliens, had a right to sue in the Circuit Court. *Weems v. George*, 13 How. 190.

14. (Dec., 1857.) Where a person was born at Goliad, then in the State of Coahuila and Texas, being a part of the Republic of Mexico, which place was also the domicile of her father and mother until their deaths, and was removed at the age of four years, before the declaration of Texan independence, to Matamoros, in Mexico, this person is an alien, and can sue in the courts of the United States. *Jones v. McMasters*, 20 How. 8.

15. Her allegiance remained unchanged, unless by her election, which it was incumbent on the opposite party to show. *Ib.*

16. (Oct., 1814.) If a foreign corporation, established in a foreign country, sue in our courts, and war intervene between the countries, pending the suit, this is not sufficient to defeat the action, unless it appear on the record that the plaintiffs are not within any of the exceptions which enable an alien enemy to sue. *The Society, &c. v. Wheeler*, 2 Gall. 104.

17. (May, 1828.) Where a party defendant is a citizen of the United States, and resident in a foreign country, not having any inhabitancy in any state of the Union, the Circuit Court of the United States has no power to maintain jurisdiction over him in a suit brought by an alien against him, although he has property within the district which may be attached. *Picquet v. Swan*, 5 Mason, 35.

18. The Judiciary Act of 1789, ch. 20, does not contemplate compulsive process against any person in any district, unless he be an inhabitant of, or found within, the same district at the time of serving the writ. *Ib.*

19. (May, 1839.) The national character of persons, for the purposes of trade and commerce, depends not upon the country of their nativity, but upon the place of their actual domicile, both in peace and in war. *Wildes v. Parker*, 3 Sumn. 593.

20. *Quære*: Whether a native-born American citizen domiciled in a foreign country, and carrying on business in a house of trade established there, but never naturalized there, is to be deemed an alien merchant, and, as such, is entitled to maintain a suit, at law or in equity, in the Circuit Courts of the United States, touching the business or trade of the said house, against a citizen of the state of his birth, and of the State where the suit is brought. *Ib.*

21. (Oct., 1846.) An alien friend can bring here, when injured, any personal action which a citizen can. And though he is not admitted to the same political and municipal rights which citizens are entitled to, the protection of his person and property against frauds and wrongs is due, and is just. *Taylor v. Carpenter*, 2 Woodb. & M. 2.

22. (Feb., 1851.) Under sec. 11 of the Judiciary Act of 1789 (1 Stat. at Large, 78), construed in connection with art. 3, s. 2, of the Constitution of the United States, it is not sufficient to give jurisdiction of a suit to a Circuit Court, that one of the parties to it is an alien. *Prentiss v. Brennan*, 2 Blatchf. 162.

23. The controversy, in order to give jurisdiction, must be one in which a citizen of a state and an alien are parties. *Ib.*

24. Where the plaintiff was a native of New York, but had resided in Canada, and been in business there for thirty years before bringing his suit, and resided there when he brought his suit, and had taken the oath of allegiance there to the Queen of

Great Britain, and the defendant was a citizen of Canada, and a subject of the Queen of Great Britain, — *Held*, that this court had no jurisdiction of the case. *Ib.*

25. Though the plaintiff might for some purposes be regarded as a citizen of the United States, he was not a citizen of the State of New York, which was essential to give jurisdiction. *Ib.*

26. (March, 1855.) This court has jurisdiction of an original civil suit in which the plaintiff is a citizen, and the defendant is an alien, even though the defendant is a resident foreign consul duly admitted as such by the President. *Hospital v. Barclay*, 3 Blatchf. 259.

27. The consular character of an alien only exempts him from the jurisdiction of state courts in civil suits; and he may be sued in this court as well as in a District Court. *Ib.*

28. (April, 1857.) This court has jurisdiction of a suit against a foreign consul. *Graham v. Stucken*, 4 Blatchf. 50.

29. (March, 1869.) Where an action on contract was brought in this court against the persons composing a firm, and the jurisdiction of the court depended wholly on the fact that one of the defendants was a consul in the United States for a foreign power, and it was held that the firm was not liable, but that one of the defendants other than the consul was liable with two other persons who composed with him a former firm, — *Held*, that this court had no jurisdiction to give judgment against such defendant. *Bixby v. Janssen*, 6 Blatchf. 315.

30. (Oct., 1830.) An alien resident in New Jersey, who holds land under a special law of that state, may sustain a suit in the Circuit Court relating to such land. *Bonaparte v. Camden & Amboy Railroad Co.*, Baldw. 205.

31. (1870.) An Indian residing within the United States is not a "foreign citizen or subject," within the meaning of s. 2, art. 3, of the Constitution, and cannot, on the ground that he is a "foreign citizen or subject," maintain a suit in the Circuit Court of the United States. *Karrahoo v. Adams*, 1 Dill. 344.

32. (April, 1867.) Where both plaintiff and defendant are aliens, the judicial power of the United States does not extend to the case on account of the character of the parties thereto. *Hinckley v. Byrne*, Deady, 224.

33. Where the action is between a citizen of a state and a subject of a foreign state, the court has jurisdiction on account of

the character of the parties, without reference to the fact of which of them is plaintiff or defendant. *Ib.*

34. (Aug., 1879.) Where a citizen of the state transfers real property to an alien, the Circuit Court of the United States will take jurisdiction of a suit affecting such property brought by the alien against another citizen, although the conveyance was upon a nominal consideration, and made for the purpose of giving the court jurisdiction, provided it be not accompanied with an agreement to transfer the property to the grantor after the termination of the litigation. The court, in the absence of such agreement, will not inquire into the motives which induced the transfer. *De Laveaga v. Williams*, 5 Sawyer, 573.

Jurisdiction. Citizenship.

1. (Aug., 1797.) But at February term, 1797, the court having decided in the case of *Bingham v. Cabot et al.*, that in order to sustain the jurisdiction of the federal court, it must be set forth in the process that the parties are citizens of different states; and that form having been omitted in the present suit, this and several other writs of error were struck off the docket. *Emory v. Grenough*, 3 Dall. 369.

2. The process of the federal courts must set forth that the parties are citizens of different states, to give jurisdiction of the cause. *Ib.*

3. (Feb., 1798.) This action came again before the court on a writ of error; and an objection was taken to the record, that it was not stated, and did not appear in any part of the process and pleadings, that the plaintiffs below and the defendant were citizens of different states, so as to give jurisdiction to the federal court.

The court were clearly of opinion that it was necessary to set forth the citizenship (or alienage, where a foreigner was concerned) of the respective parties, in order to bring the case within the jurisdiction of the Circuit Court; and that the record in the present case was in that respect defective. *Bingham v. Cabot*, 3 Dall. 382, 383.

4. (Aug., 1799.) Error assigned: That it does not appear on the pleadings, &c., that either the plaintiff or defendant was an alien, or that they were citizens of different states. Plea: *In nullo est erratum*. Replication and issue.

BY THE COURT: The decision in the case of *Bingham v. Cabot et al.* must govern the present case. Let the judgment be reversed with costs. *Turner v. Eurille*, 4 Dall. 7.

5. (Aug., 1799.) The error assigned, the only one insisted on, is, that it does not appear from the record that Biddle & Co., the promisees, or any of them, are citizens of a state other than that of North Carolina, or aliens. . . . But here the description given of the promisee only is, that "he used trade" at Philadelphia or North Carolina; which, taking either place for that where he used trade, contains no averment that he was a citizen of a state other than that of North Carolina, or an alien, nor anything which, by legal intendment, can amount to such averment. We must, therefore say that there is error. *Turner v. Bank of North America*, 4 Dall. 8, 11.

6. (May, 1802.) A citizen of one state removing to another, purchasing real estate, paying taxes, and residing in the latter for about four years, becomes a citizen thereof, so far as regards the jurisdiction of a federal court; notwithstanding a temporary absence, during which he acquired and exercised municipal rights in a third state. *Knox v. Greenleaf*, 4 Dall. 336.

7. (Feb., 1804.) The courts of the United States have not jurisdiction in cases between citizens of the United States, unless the record expressly states them to be citizens of different states. *Wood v. Wagon*, 2 Cranch, 9.

8. (Feb., 1804.) The courts of the United States have not jurisdiction, unless the record shows that the parties are citizens of different states, or that one is an alien. *Capron v. Van Noorden*, 2 Cranch, 126.

9. (Feb., 1806.) If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants, in the courts of the United States, in order to support the jurisdiction. *Strawbridge v. Curtis*, 3 Cranch, 267.

10. (Feb., 1816.) All the parties on each side must be subject to the jurisdiction, or the suit will be dismissed. *New Orleans v. Winter*, 1 Wheat. 91.

11. (Feb., 1818.) Where M'R., a citizen of Kentucky, brought a suit in equity in the Circuit Court of Kentucky, against C. C., stated to be a citizen of Virginia, and E. J. and S. E., without any designation of citizenship, all the defendants

appeared and answered, and a decree was pronounced for the plaintiff, it was *held*, that if a joint interest vested in C. C. and the other defendants, the court had no jurisdiction over the cause. But that if a distinct interest vested in C. C., so that substantial justice (so far as he was concerned) could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone. *Cameron v. M'Roberts*, 3 Wheat. 591.

12. (Feb., 1821.) In order to maintain a suit in the Circuit Court, the jurisdiction must appear on the record; as if the suit is between citizens of different states, the citizenship of the respective parties must be set forth. *Sullivan v. The Fulton Steamboat Co.*, 6 Wheat. 450.

13. (Feb., 1823.) The courts of the United States have jurisdiction of suits by or against executors and administrators, if they are citizens of different states, &c., although their testators or intestates might not have been entitled to sue, or liable to be sued in those courts. *Childress v. Emory*, 8 Wheat. 642.

14. (Feb., 1825.) The joinder of improper parties, as citizens of the same state, &c., will not affect the jurisdiction of the Circuit Courts in equity, as between the parties who are properly before the court, if a decree may be pronounced as between the parties who are citizens of the same state. *Carneal v. Banks*, 10 Wheat. 181.

15. (Jan., 1832.) A citizen of the United States, residing in any state of the Union, is a citizen of that state. *Garsies v. Ballou*, 6 Pet. 761.

16. (Jan., 1834.) Bill in equity by a resident of Pennsylvania against residents of Kentucky, to determine title to lands in the latter state, and to obtain a decree for conveyance. Complainant died pending the suit, and it was revived in the name of his heirs.

The defendant William Chiles, in his answer, states that there were other heirs of Hay than those mentioned in the bill, and made defendants, who are not residents of Kentucky.

The Circuit Court were divided in opinion on two questions, which were certified to this court as follows:—

1st. Under all the circumstances appearing as above, can this court entertain cognizance of the case?

2d. (Not relating to jurisdiction.) BY THE COURT: The question between the plaintiffs and the defendant, William Chiles, is

within the jurisdiction of the Circuit Court for the District of Kentucky, and may be decided by that court, though Hay's heirs were not parties to the suit. That they were made parties cannot oust the jurisdiction as between those who are properly before the court. *Boon's Heirs v. Chiles*, 8 Pet. 532.

17. (Jan., 1838.) A bill was filed by W., a citizen of Connecticut, against M. and others, citizens of Rhode Island, in the Circuit Court of the United States for the District of Rhode Island. An answer was put in to the bill, and the cause was referred to a master for an account. Pending these proceedings the complainant died, and the administration of his effects was granted to C., a citizen of Rhode Island, who filed a bill of revivor in the Circuit Court. The laws of Rhode Island do not permit a person residing out of the state to take out administration of the effects of a deceased person within the state, and make such administration indispensable to the prosecution and defense of any suit in the state, in right of the estate of the deceased. *Held*, that the bill of revivor was in no just sense an original suit, but was a mere continuation of the original suit. The parties to the original suit were citizens of different states, and the jurisdiction of the court completely attached to the controversy. Having so attached, it could not be divested by any subsequent proceedings; and the Circuit Court of Rhode Island has rightful authority to proceed to its final determination. *Clarke v. Mathewson*, 12 Pet. 164.

18. A bill of revivor is not the commencement of a new suit, but is the mere continuance of the old suit. It is upon ground somewhat analogous that the Circuit Courts are held to have jurisdiction in cases of cross bills and injunction bills, touching suits and judgments already in those courts. *Ib.*

19. In the thirty-first section of the Judiciary Act of 1789, Congress manifestly treats the revivor of a suit, by or against the representatives of the deceased party, as a matter of right, and as a mere continuance of the original suit, without any distinction as to citizenship of the representative, whether he belongs to the same state where the cause is pending, or to another state. *Ib.*

20. (Jan., 1844.) By a law of the State of Mississippi, sheriffs are required to give bonds to the Governor for the faithful performance of their duty.

A citizen of another state has a right to sue upon this bond;

the fact that the Governor and party sued are citizens of the same state will not oust the jurisdiction of the Circuit Court of the United States, provided the party for whose use the suit is brought is a citizen of another state. *McNutt v. Bland*, 2 How. 9.

21. (Jan., 1844.) This motion is not a new suit, but an incident of a prior one; and hence residence of the parties in different states need not be averred in order to give jurisdiction to the court. *Gwin v. Breedlove*, 2 How. 29.

22. (Jan., 1848.) Where an individual has resided in a state for a considerable time, being engaged in the prosecution of business, he may well be presumed to be a citizen of such state, unless the contrary appear. And this principle is strengthened when the individual lives on a plantation and cultivates it with a large force, claiming and improving the property as his own. *Shelton v. Tiffin*, 8 How. 163.

23. On a change of domicile from one state to another, citizenship may depend upon the intention of the individual. But this intention may be shown more satisfactorily by acts than declarations. An exercise of the right of suffrage is conclusive upon the subject; but acquiring a right of suffrage, accompanied by acts which show a permanent location, unexplained, may be sufficient. *Ib.*

24. The facts that the party and his wife were residents of Louisiana for more than two years before the commencement of the suit; that he was absent only once, on a visit to a watering-place; that he resided a greater part of the time on a plantation which he claimed as his own; that he constructed upon it a more secure and comfortable dwelling-house; that he observed to a witness that he considered himself a resident, — are sufficient to justify the Circuit Court of Louisiana in exercising jurisdiction in a suit brought against that party by a citizen of Missouri. *Ib.*

25. Where a citizen of Virginia sued, in the Circuit Court of Louisiana, two persons jointly, one of whom was a citizen of Louisiana and the other of Missouri, and an attorney appeared for both defendants, the citizen of Missouri is at liberty to show that the appearance for him was unauthorized. If he shows this, he is not bound by the proceedings of the court, whose judgment, as to him, is a nullity. *Ib.*

26. (Dec., 1864.) Where a judgment has been obtained in the

Circuit Court of the United States for the District of Kentucky, in a suit brought by a citizen of Maryland against certain persons in Kentucky, and the judgment was afterwards perpetually enjoined, at the instance of the defendants, and a bill was filed by a citizen of Kentucky against the original defendants, who were also citizens of Kentucky, this bill was properly dismissed by the court for want of jurisdiction. *Wickliffe v. Eve*, 17 How. 468.

27. (Dec., 1855.) The change of citizenship from one state to another must be made with a *bona fide* intention of becoming a citizen of the state to which the party removes. *Jones v. League*, 18 How. 76.

28. It was not such a *bona fide* change where the plaintiff only made a short absence, and it appeared from the deed under which he claimed, that he was in fact prosecuting the suit for the benefit of his grantor, who could not sue, receiving a portion of the land recovered, as an equivalent for paying one-third of the costs and superintending the prosecution of the suit. *Ib.*

29. In such a case, the federal court has no jurisdiction. *Ib.*

30. (Dec., 1856.) In the Circuit Courts of the United States, the record must show that the case is one in which, by the Constitution and laws of the United States, the court had jurisdiction; and if this does not appear, and the court gives judgment either for plaintiff or defendant, it is error, and the judgment must be reversed by this court; and the parties cannot, by consent, waive the objection to the jurisdiction of the Circuit Court. *Dred Scott v. Sandford*, 19 How. 393.

31. The Circuit Court can give no judgment for plaintiff or defendant in a case where it has not jurisdiction, no matter whether there be a plea in abatement or not. And unless it appears upon the face of the record, when brought here by writ of error, that the Circuit Court had jurisdiction, the judgment must be reversed. *Ib.*

32. The case of *Capron v. Van Noorden* (2 Cranch, 126) examined, and the principles thereby decided reaffirmed. *Ib.*

33. (Dec., 1858.) After the divorce *a mensa et thoro* in New York, and the removal of the husband to Wisconsin, the domicile of the wife did not follow that of the husband, but remained unchanged in New York. The jurisdiction of the United States court therefore attached, as it respected the different citizenship of the parties. *Barber v. Barber*, 21 How. 582.

34. The American and English authorities upon this point examined. *Ib.*

35. (Dec., 1859.) The courts of the United States, as courts of equity, have jurisdiction over executors and administrators where the parties to the suit are citizens of different states; and this jurisdiction is not barred by subsequent proceedings in insolvency in the Probate Court of a state. *Green's Administratrix v. Creighton*, 23 How. 90.

36. In such a case the courts may interpose in favor of a foreign creditor, to arrest the distribution of any surplus of the estate of a decedent among the heirs. *Ib.*

37. (Dec., 1860.) The statutes of Ohio give to the local authorities of cities and incorporated villages, power to make various improvements in streets, &c., and to assess the proportionate expense thereof upon the lots fronting thereon, which is declared to be a lien upon the property.

The city council of Toledo directed certain improvements to be made, and contracted with two persons (one of whom purchased the right of the other) to do the work, and authorized them to collect the amounts due upon the assessments.

The contractor who executed the work, and who was a citizen of another state, filed a bill upon the equity side of the Circuit Court to enforce this lien.

The court had jurisdiction of the case. *Fitch v. Creighton*, 24 How. 159.

38. (Dec., 1869.) By the practice of the courts of Louisiana, a practice which has been adopted in the Circuit Court in that district, the mode of proceeding in an attachment suit against a surety on a forthcoming bond, given to obtain a release of property attached, is by rule to show cause; and this proceeding being merely incidental to the original suit, a jurisdiction existing in such suit will not cease, because the parties to the rule are citizens of the same state. *Reilly v. Golding*, 10 Wall. 56.

39. Especially is this true where the defendant in the rule has appeared and answered on merits, and the case has gone to judgment. *Ib.*

40. (Dec., 1870.) A bill for injunction to restrain proceedings of garnishment against the complainant's property, instituted in the Circuit Court, and also praying the benefit of a set-off against the garnishing creditor's demand, is not an original suit, but is a

defensive or supplementary suit, in which the jurisdiction of the court does not depend on the citizenship of the parties, but on the cognizance of the original case. *Jones v. Andrews*, 10 Wall. 327.

41. (Dec., 1870.) In controversies between citizens of different states, where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, if there are several co-plaintiffs, each plaintiff must be competent to sue, and if there are several co-defendants, each defendant must be liable to be sued in those courts, or the jurisdiction cannot be entertained. *Coal Co. v. Blatchford*, 11 Wall. 172.

42. Executors and trustees suing for others' benefit form no exception to this rule. If they are personally qualified by their citizenship to bring suit in the courts of the United States, the jurisdiction is not defeated by the fact that the parties whom they represent may be disqualified; and if they are not personally qualified by their citizenship, the courts of the United States will not entertain jurisdiction, although the parties they represent may be qualified. *Ib.*

43. The cases of *Browne v. Strode* (5 Cranch, 303) and *McNutt v. Bland* (2 How. 10) commented upon and explained. *Ib.*

44. (Dec., 1870.) The Circuit Court of the United States has no jurisdiction under the act of March 12, 1863, commonly known as the Abandoned and Captured Property Act, where both parties are citizens of the same state. *Mail Co. v. Flanders*, 12 Wall. 130.

45. (Dec., 1871.) A citizen of one state getting letters of administration on the estate of a decedent there, its citizen also, and afterwards removing to another state, and becoming a citizen of it, may sue in the Circuit Court of the first state, there being nothing in the laws of that state forbidding an administrator to remove from that state. *Rice v. Houston*, 13 Wall. 66.

46. (Dec., 1871.) Where a bill does not relate to some matter already litigated in the same court by the same persons, and which is not either in addition to, or a continuance of, an original suit, it is an original bill, not an ancillary one.

Accordingly, when such bill is between citizens of the same state, the Circuit Courts have no jurisdiction. *Christmas v. Russell*, 14 Wall. 69.

47. (Oct., 1873.) When objection is taken to the jurisdiction of the Circuit Court of the United States, by reason of the citizenship of some of the parties to a suit, the question is whether, to a decree authorized by the case presented, they are indispensable parties. If their interests are severable from those of other parties, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained, and the suit dismissed as to them. *Horn v. Lockhart*, 17 Wall. 570.

48. (Oct., 1878.) Where the jurisdiction of a court of the United States depends upon the citizenship of the parties, such citizenship, and not simply their residence, must be shown by the record. *Robertson v. Cease*, 7 Otto, 646.

49. The ruling in *Railway Company v. Ramsey* (22 Wall. 322), approved in *Briges v. Sperry* (95 U. S. 401), that such citizenship need not necessarily be averred in the pleadings, if it otherwise affirmatively appears by the record, does not apply to papers copied into the transcript, which do not make a part of the record by bill of exceptions, or by any order of the court referring to them, or by some other mode recognized by law. *Ib.*

50. The presumption that a case is without the jurisdiction of the Circuit Court, remains now as it was before the adoption of the Fourteenth Amendment to the Constitution of the United States. *Ib.*

51. (Oct., 1879.) The jurisdiction of the Circuit Court is not defeated by the fact that, with the principal defendant are joined, as nominal parties, the executors of a deceased trustee, citizens of the same state as the complainant, to perform the ministerial act of conveying title, in case the power to do so is vested in them by the laws of the state. *Walden v. Skinner*, 11 Otto, 577.

52. (Nov., 1818.) The Circuit Court has no jurisdiction of suits between citizens of different states, except where one of the parties is a citizen of the state where the suit is brought. *White v. Fenner*, 1 Mason, 520.

53. (Nov., 1826.) A native citizen of Rhode Island, whose father was dead, but whose mother lived on the family estate in Rhode Island, went to New York, to reside as a merchant, and there failed, and afterwards returned to his mother's family, and resided there, being unmarried. At the time when the suit was brought he was in a store in Connecticut, acting as a clerk there

for his brother. He was sued as a citizen of Rhode Island. There being no proof that he intended a permanent residence in Connecticut, it was *held* by the court, upon these facts, that he was a citizen of Rhode Island. *Catlin v. Gladding*, 4 Mason, 308.

54. (May, 1827.) A bill in equity to enjoin a judgment lies in the Circuit Court where the judgment is given, although the original plaintiff resides in, and is a citizen of, another state. *Dunlap v. Stetson*, 4 Mason, 349.

55. Such a bill is not an original suit, within the sense of the eleventh section of the Judiciary Act of 1789, ch. 20. *Ib.*

56. (Oct., 1827.) Where the real parties in the record are not citizens of different states, the court has no jurisdiction. *Dodge v. Perkins*, 4 Mason, 435.

57. Where an administrator sues, as such, and he is a citizen of the same state as the defendant, the court has no jurisdiction, although the intestate was a citizen of another state. An administrator is, in such case, the real, and not a nominal party. *Ib.*

58. (Oct., 1835.) If a citizen removes from one state to another, in order to prosecute suits in the courts of the United States, provided the removal be real, the motive of the act cannot be inquired into. *Briggs v. French*, 2 Sumn. 252.

59. (Nov., 1835.) The Circuit Court of the United States cannot entertain a bill of revivor, where the controversy which it seeks to revive is now between citizens of the same state, though the parties to the original bill were citizens of different states; as where a bill of revivor was brought by an administrator, who was a citizen of the same state with the defendant, though his intestate was of a different state. *Clarke v. Matthewson*, 2 Sumn. 262.

60. Where the parties are citizens of different states at the commencement of the suit, a subsequent change of domicile and citizenship will not oust the jurisdiction. *Ib.*

61. (Oct., 1845.) Where a bill in equity alleged that one of several defendants contracted to transfer a patent (not then obtained) for a machine, and that after it was obtained he refused so to do, and that the other defendants, knowing these facts, bought machines of him, — *Held*, that as the suit could be maintained against him alone, the fact that some of the other defendants were citizens of the same state with the plaintiffs was not

fatal to the jurisdiction. *Nesmith v. Calvert*, 1 Woodb. & M. 34.

62. (May, 1878.) Jurisdiction was assumed, although one of the parties respondent was a citizen of the same state as the complainant, it appearing that the suit was auxiliary to the original suit previously commenced, and still pending between citizens of different states. *Stone v. Bishop*, 4 Cliff. 593.

63. (Oct., 1826.) To deprive an American citizen of the right of suing in a Circuit Court, on the ground of his not being a citizen of any particular state, there ought to be very strong evidence of his being a mere wanderer, without a home. *Rabaud v. D' Wolf*, 1 Paine, 580.

64. (Oct., 1826.) It is not necessary that a citizen, removing from a territory of the United States, or a state, into another state, should acquire all the rights of a citizen of the state into which he removes, by the laws of such state. It is sufficient if he acquires a domicile there. Yet the declaration must aver that he is a citizen of the state. It is not sufficient to aver that he is a resident. Difficulty in understanding the term *citizen*, as used in the Constitution. *Catlett & Keith v. Pacific Ins. Co.*, 1 Paine, 594.

65. If one make such removal with the avowed object of acquiring a right to sue in the Circuit Court, but with the intention of a permanent residence, and not to return, it is not a fraud upon the law. *Ib.*

66. (May, 1827.) The eleventh section of the Judiciary Act confines the jurisdiction of the Circuit Courts, on the ground of citizenship, to cases where the suit is between a citizen of the state where the suit is brought and a citizen of another state; and although the Constitution gives a broader extent to the judicial power, the actual jurisdiction of the Circuit Courts is governed by the Judiciary Act. *Moffat v. Soley*, 2 Paine, 103.

67. Nor does the subsequent clause of the eleventh section, as to the defendant's arrest, &c., enlarge the jurisdiction. *Ib.*

68. Therefore, where a citizen of New York and a citizen of Georgia sued a citizen of Massachusetts, in New York, where he was arrested, it was *held*, that the court had not jurisdiction. *Ib.*

69. (Oct., 1850.) A citizen of Connecticut brought a suit in equity, in this court, against a citizen of New Jersey, for a breach of contract, and prayed an account. *Held*, that this court had

no jurisdiction of the case, neither party being a citizen of New York, although the subject-matter of the contract was a patent. *Goodyear v. Day*, 1 Blatchf. 565.

70. (Dec., 1854.) In order to give jurisdiction, in a suit brought in this court, one party, plaintiff or defendant, must appear by the record to be a citizen of the United States. *Rateau v. Bernard*, 3 Blatchf. 245.

71. Joining an alien with a citizen will not affect the jurisdiction, especially if the alien is not a material party. *Ib.*

72. (March, 1855.) Where a bill in equity is filed in this court, to stay proceedings at law pending in this court, the equity suit is auxiliary to the action at law, and may be maintained without regard to the citizenship or alienage of the parties to the record, and although the court may not have jurisdiction over the parties for other relief. *St. Luke's Hospital v. Barclay*, 3 Blatchf. 259.

73. (Nov., 1867.) This court has no jurisdiction of a suit where one party is a citizen of Georgia and the other party is a citizen of Massachusetts. *Kelly v. Harding*, 5 Blatchf. 502.

74. This court has no jurisdiction whatever over controversies between parties, all of whom, plaintiffs as well as defendants, are citizens of states other than that in which the suit is brought. *Ib.*

75. (Aug., 1874.) The provisions of the Judiciary Act of 1789, giving the Circuit Courts jurisdiction where a suit is between a citizen of the State where the suit is brought and a citizen of another state, and declaring that no civil suit shall be brought therein against an inhabitant of the United States in any other district than that whereof he is an inhabitant, or in which he shall be found, do not forbid the exercise of jurisdiction where some of the defendants reside in the state in which the suit is brought, and other defendants, who appear and submit to the jurisdiction, reside in other states. In such case, any supposed defect of jurisdiction relates not to jurisdiction of the action, but to jurisdiction of the person, and is waived by appearance. *Pond v. Vermont Valley Railroad Co.*, 12 Blatchf. 280.

76. Under the act of Feb. 28, 1839 (5 Stat. at Large, 321, s. 1), the jurisdiction of the Circuit Court in such case is clear. *Ib.*

77. (June, 1875.) This court has no power to administer common-law relief in a suit between citizens of the same state. *Boucicault v. Hart*, 13 Blatchf. 47.

78. (April, 1817.) The Circuit Court has no jurisdiction, when neither of the parties in the suit is a citizen of the state in which the action is instituted. *Shute v. Davis*, Pet. C. C. 431.

79. Where the plaintiff was a citizen of Kentucky, and one of the defendants was a citizen of Pennsylvania, and the other defendant a citizen of New Orleans, but no process had been served on the latter, the jurisdiction of the court in the case was maintained. *Ib.*

80. (Oct., 1804.) A suit on a policy of insurance is properly brought, if instituted in the name of the owner of the property intended to be insured. And if the assured is a citizen of another state, the Circuit Court has jurisdiction, although the agent, whose name only appears in the policy, is a citizen of the state of Pennsylvania. *Ruan v. Gardner*, 1 Wash. 145.

81. (April, 1821.) The declaration states the plaintiff to be a citizen of Georgia, Strawbridge to be a citizen of Pennsylvania, and Sullivan to be a citizen of Massachusetts; and a general appearance was entered by an attorney employed by Sullivan, who knew nothing of the suit. *Kitchen v. Williamson*, 4 Wash. 84.

82. To give jurisdiction to this court, one of the parties must be a citizen of this state, which neither the plaintiff nor Sullivan was. If the plaintiff had been a citizen of this state, the court would have had jurisdiction; but still, Sullivan could not have been compelled to appear to the suit, unless he had been served with process in this district, or had chosen to waive his privilege, and voluntarily appear. But in a case like this, where there is a total defect of jurisdiction, no appearance or service of process here could give it. *Ib.*

83. (April, 1821.) A citizen of one state is to be considered as a citizen of every other state in the Union. Citizenship, in relation to the federal judiciary, must be of that kind which identifies the party with some particular state, of which he is a member. *Lessee of Butler v. Farnsworth*, 4 Wash. 101.

84. The only rational construction of the Constitution, in relation to jurisdiction of the federal courts, is to limit it to cases where the suit is between *resident* citizens of separate states, or where an alien is a party. *Ib.*

85. In order to give jurisdiction to the courts of the United States, the citizenship of the party must be founded on a change of domicile, and permanent residence in the state to which he

may have removed from another state. Mere residence is *prima facie* evidence of such change, although when it is explained and shown to have been for temporary purposes, the presumption is destroyed. The intention is to be collected from acts, and not from the declarations of the party. *Ib.*

86. (April, 1825.) What constitutes judicial citizenship, in reference to the jurisdiction of the courts of the United States. *Read v. Bertrand*, 4 Wash. 514.

87. (April, 1830.) A citizen of New York obtained a judgment against a citizen of Pennsylvania, in a court of the state, which the plaintiff assigned to a citizen of Pennsylvania, whose executors assigned it to the complainant, an alien. *Held*, that he could sustain a bill in equity in this court, notwithstanding the intermediate assignment to a citizen of Pennsylvania. *Wilson v. Fisher's Executors*, Baldw. 133.

88. (Nov., 1819.) Question of jurisdiction: What constitutes citizenship in another state, in the sense of the Constitution and Judiciary Act, with reference to the jurisdiction of the Federal courts. *Prentiss v. Barton's Executors*, 1 Brock. 389.

89. (April, 1870.) Unless a party has a right to sue in the local courts, he cannot sue in the federal courts. The latter cannot create a right to sue, and can only take jurisdiction when the right exists by law, and the plaintiff and defendant are citizens of different states. *Morgan v. Railroad Co.*, 1 Woods, 15.

90. (Jan., 1871.) When G., a citizen of the State of New York, was appointed by a court of competent jurisdiction, receiver of the property of a railroad corporation created by the laws of Texas, and domiciled in that state, the Circuit Court of the United States for the Western District of Texas had jurisdiction of a suit brought by such receiver against citizens of that district. *Gray v. Davis*, 1 Woods, 420.

91. (April, 1871.) The United States Circuit Court has no jurisdiction of a cause in which the complainants, and a part only of the defendants, are citizens of the same state, although such defendants voluntarily appear and answer without objecting to the jurisdiction. *Lockhart v. Horn*, 1 Woods, 628.

92. (April, 1877.) Whenever the controversy in a suit is between citizens of different states, it is within the judicial power of the United States, though there are other persons in the case

citizens of the same state with a person or persons on the opposite side to them. *Girardey v. Moore*, 3 Woods, 397.

93. Subject to a limitation as to the amount in controversy, the act of March 3, 1875, "to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," invests the federal courts with jurisdiction arising from diverse citizenship of litigant parties, coextensive with the judicial power conferred upon the general government by the Constitution. *Ib.*

94. Persons who are only nominally interested in the controversy cannot confer jurisdiction or take it away. *Ib.*

95. (June, 1841.) By the Constitution, jurisdiction is given to the courts of the United States, between citizens of different states. The act of 1789 restricts the exercise of this jurisdiction to cases where one of the parties is a citizen of the state where the suit is brought. And by the settled construction of this act, where there are more than one party, plaintiff and defendant, the court must have jurisdiction between each party, plaintiff and defendant. This produced great embarrassment in the proceedings before the Circuit Courts. And to remedy this inconvenience the act of 1839 was passed, which enables a party defendant who may not reside in the district voluntarily to become a party to the suit. By his submitting himself in this form to the jurisdiction of the court, the jurisdiction is not ousted. *Taylor v. Cook*, 2 McLean, 516.

96. (June, 1845.) The court has no jurisdiction of a case where the complainant and one of the party defendants reside in the same state. *Ketchum v. Farmers' Loan & Trust Co.*, 4 McLean, 1.

97. In such a case, consent cannot give jurisdiction, and a decree so entered will be set aside on bill of review. *Ib.*

98. (June, 1845.) If he [a person not served with process, who is a joint promisor] be a citizen of the same state as the plaintiff, the court can take no jurisdiction. *Burgh v. Page*, 4 McLean, 11.

99. (June, 1846.) A creditor's bill is a continuation of the suit at law, as it merely seeks to obtain the fruits of the judgment, or to remove obstacles to the remedy at law. In such a case, a change of residence of the complainant to the State of Michigan does not oust the jurisdiction of this court. *Hatch v. Dorr & Rendrick*, 4 McLean, 112.

100. (April, 1854.) Where the defendant is a citizen of Illinois, and the plaintiff a citizen of another state, and an attachment writ is served upon property, and defendant personally served with process, this court can take cognizance of the case. *North v. McDonald*, 1 Biss. 57.

101. (Dec., 1863.) An action cannot be maintained in this court against joint contractors, where one of them resides in the same state with the plaintiff. *Lovejoy v. Washburne*, 1 Biss. 416.

102. If one is not served with process, he may enter his appearance, and join with the other in a plea to the jurisdiction; and the suit will be dismissed for want of jurisdiction. *Ib.*

103. (May, 1868.) It is a general rule that, to give the United States courts jurisdiction of a cause, the plaintiffs and defendants must be citizens of different states. But to this rule there are several exceptions. *Cornwell v. Canal Co.*, 4 Biss. 195.

104. In a cause over which a national court has acquired jurisdiction solely by reason of the citizenship of the parties, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process; and if no state court has power to guard and determine those rights and interests without a conflict of authority with the national court, the latter court will, from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing without regard to their citizenship, so far as to protect their rights and interests relating to such judgment or property, and so far as to correct any abuse or misapplication of its process, and no farther. The court will not entertain jurisdiction on behalf of a citizen of the state to litigate new or original matters, or any which might be settled in a state court without interfering with the jurisdiction already attached. *Ib.* See also *Barth v. Makeever*, 4 Biss. 206.

105. (June, 1877.) The United States Circuit Court has jurisdiction of a suit upon a *supersedeas* bond given in that court, independent of the citizenship of the parties. *Seymour v. Phillips & Colby Construction Co.*, 7 Biss. 460.

106. (1874.) The Circuit Court of the United States has jurisdiction of a suit in chancery, commenced on behalf of an infant who is a citizen of another state, against a citizen of the state where the suit is brought, although the next friend of the

infant complainant be a citizen of the same state with the defendant. *Williams v. Ritchey*, 3 Dill. 406.

107. (April, 1853.) A garnishment is a suit or proceeding in which a party has day in court; and it must therefore appear on the face of the pleadings, or by the record, that the judgment creditor and the garnishee are citizens of different states, to give the court jurisdiction. *Tunstall v. Worthington*, Hempst. 662.

108. Where it appears that the judgment creditor and garnishee are citizens of the same state, the Circuit Court will, of its own motion, dismiss the case for want of jurisdiction, at any stage of the proceedings. *Ib.*

109. (April, 1855.) Representatives of deceased parties may be substituted, although citizens of the same state. *Trigg v. Conway*, Hempst. 711.

110. (May, 1878.) The vendee of the plaintiff, in an action to recover possession of real property, is not a party thereto, and therefore his citizenship is an immaterial matter, and in no way affects the jurisdiction of the national courts. *Elliot v. Teal*, 5 Sawyer, 188.

Jurisdiction. Citizen of a Territory.

1. (Feb., 1816.) A citizen of a *territory* cannot sue a citizen of a *state* in the courts of the United States, nor can those courts take jurisdiction by other parties being joined, who are capable of suing. All the parties on each side must be subject to the jurisdiction, or the suit will be dismissed. *New Orleans v. Winter*, 1 Wheat. 91.

Jurisdiction. Citizens of the District of Columbia.

1. (Feb., 1805.) A citizen of the District of Columbia cannot maintain an action against a citizen of Virginia, in the Circuit Court for the Virginia district. A citizen of the District of Columbia is not a citizen of a *state*, within the meaning of the Constitution. *Hepburn v. Ellzey*, 2 Cranch, 444.

2. (Dec., 1867.) A citizen of the District of Columbia cannot be a party to a suit in the federal courts, where the jurisdiction depends on the citizenship of the parties. *Barney v. Baltimore City*, 6 Wall. 280.

3. (Oct., 1811.) A citizen of the District of Columbia is not

entitled to sue in the Circuit Courts of the United States. *Wescott's Lessee v. The Inhabitants of Fairfield Township, &c.*, Pet. C. C. 45.

4. (April, 1825.) A citizen of the District of Columbia cannot maintain an action in the Circuit Courts of the United States. *Vasse v. Mifflin*, 4 Wash. 519.

5. (March, 1863.) Under the clause of the Judiciary Act of 1789, giving United States Circuit Courts jurisdiction of certain causes between a citizen of the state where the suit is brought and a citizen of another state, citizenship of one of the suitors in the District of Columbia does not give jurisdiction. *Barney v. Baltimore*, 1 Hughes, 118.

Jurisdiction. Citizenship of Corporations.

1. (Feb., 1809.) A corporation aggregate cannot be a citizen, and cannot litigate in the courts of the United States, unless in consequence of the character of the individuals who compose the body politic, which character must appear by proper averments upon the record. *Hope Ins. Co. v. Boardman*, 5 Cranch, 57.

2. (Feb., 1809.) A corporation aggregate, composed of citizens of one state, may sue a citizen of another state in the Circuit Court of the United States. *Bank of United States v. Deveaux*, 5 Cranch, 61.

3. No right is conferred on the bank, by its act of incorporation, to sue in the federal courts. *Ib.*

4. A corporation aggregate cannot, in its corporate capacity, be a citizen. *Ib.*

5. (Feb., 1824.) The Circuit Courts of the United States have jurisdiction of suits brought by the Bank of the United States against another bank incorporated under a law of a state, and of which the state itself is a stockholder, together with private individuals who are citizens of the same state with some of the stockholders of the Bank of the United States. *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat. 904.

6. The Bank of the United States may sue in the Circuit Courts, as indorsee or bearer of a promissory note, although the original payee or indorser could not sue in the same courts, being a citizen of the same state with the defendants. *Ib.*

7. The circumstance that a state is a member of a private cor-

poration will not give this court original jurisdiction of suits where the corporation is a party, or oust the Circuit Courts of the jurisdiction vested in them by law. *Id.*

8. (Jan., 1828.) The complainants are stated, in the bill, to be citizens of the State of South Carolina. The defendant, the Bank of Georgia, is a body corporate, existing under an act of the legislature; but the citizenship of the individual corporators is not stated. The averment in the original bill is, that William B. Bullock and Samuel Hale are citizens of Georgia, and residents therein; William Bullock is afterwards designated in the bill as "President of the Mother Bank, and Samuel Hale as the President of the Branch Bank of Augusta, in the State of Georgia." The courts of the United States have no jurisdiction of the case. The record does not show that the defendants were citizens of Georgia, nor are there any distinct allegations that the stockholders of the bank were citizens of that state. *Breithaupt v. Bank of Georgia*, 1 Pet. 238.

9. (Jan., 1839.) In the case of the *Bank of the United States v. Deveaux*, the Supreme Court decided that, in a question of jurisdiction, they might look to the character of the persons composing a corporation; and if it appeared that they were citizens of another state, and the fact was set forth by proper averments, the corporation might sue in its corporate name in the courts of the United States. But in that case the court confined its decision, in express terms, to a question of jurisdiction; to a right to sue; and evidently went even so far with some hesitation. The propriety of that decision is fully assented to, and it has ever since been recognized as authority in this court. But the principle has never been extended any farther than it was carried in that case; and has never been supposed to extend to contracts made by a corporation, especially in another sovereignty. *Bank of Augusta v. Earle*, 13 Pet. 519.

10. (Jan., 1840.) An action was brought in the Circuit Court of Mississippi against the Commercial and Railroad Bank of Vicksburg, Mississippi, by parties who were citizens of the State of Louisiana. The defendants pleaded in abatement, by attorney, that they are an aggregate corporation, and that two of the stockholders resided in the State of Mississippi. The affidavit to the plea was sworn to by the cashier of the bank before the "deputy clerk." It was not entitled as of any term of the

court. The plaintiffs demurred to the plea. *Held*, that the appearance of the defendants in the Circuit Court, by attorney, was proper; and that if any exceptions existed to this form of the plea, they should have been urged to the receiving of it when it was offered, and are not causes of demurrer. *Held*, that the Circuit Court of Mississippi had no jurisdiction of the case. *Commercial & Railroad Bank of Vicksburg v. Slocomb*, 14 Pet. 60.

11. The artificial being, a corporation aggregate, is not, as such, a citizen of the United States; yet the courts of the United States will look beyond the mere corporate character to the individuals of whom it is composed; and if they were citizens of a different state from the party sued, they are competent to sue in the courts of the United States; but all the corporators must be citizens of a different state from the party sued. The same principle applies to the individuals composing a corporation aggregate, when standing in the attitude of defendants, which does when they are in that of plaintiffs. *Ib.*

12. The act of Congress, passed Feb. 28, 1839, entitled "An Act in amendment of the acts respecting the judicial system of the United States," did not contemplate a change in the jurisdiction of the courts of the United States, as it regards the character of the parties as prescribed by the Judiciary Act of 1789, as that act has been expounded by the Supreme Court of the United States; which is, that each of the plaintiffs must be capable of suing, and each of the defendants capable of being sued. *Ib.*

13. (Jan., 1840.) The decisions of the Supreme Court have been uniform, and as declared at the present term in the case of the *Commercial and Railroad Bank of Vicksburg v. Slocomb et al.*, that the courts of the United States cannot exercise jurisdiction, when some of the stockholders in a corporation established in one state are citizens of another state, of which the party sued by the corporation is a citizen. *Irvine v. Lowry*, 14 Pet. 293.

14. (Jan., 1844.) A citizen of one state can sue a corporation which has been created by, and transacts its business in, another state (the suit being brought in the latter state), although some of the members of the corporation are not citizens of the state in which the suit is brought, and although the state itself may be

a member of the corporation. *Louisville, Cincinnati, & Charleston Railroad Co. v. Letson*, 2 How. 497.

15. The cases of *Curtis v. Strawbridge*, 3 Cranch, 267; *Bank United States v. Deveaux and others*, 5 Cranch, 84; *Commercial and Railroad Bank of Vicksburg v. Slocomb and others*, 14 Pet. 60, reviewed and controlled. *Ib.*

16. A corporation created by, and transacting business in, a state, is to be deemed an inhabitant of the state, capable of being treated as a citizen for all purposes of suing and being sued; and an averment of the facts of its creation, and the place of transacting business, is sufficient to give the Circuit Courts jurisdiction. *Ib.*

17. (Dec., 1853.) A citizen of Virginia may sue the Baltimore and Ohio Railroad Company in the Circuit Court of the United States for Maryland, and an averment that the defendants are a body corporate, created by the legislature of Maryland, is sufficient to give the court jurisdiction. *Marshall v. The Baltimore & Ohio Railroad Co.*, 16 How. 314.

18. The constitutional privilege which a citizen of one state has to sue the citizens of another state in the federal courts cannot be taken away by the erection of the latter into a corporation, by the laws of the state in which they live. The corporation itself may therefore be sued as such. *Ib.*

19. The preceding cases upon the subject examined. *Ib.*

20. (Dec., 1857.) An averment in pleading, that the Covington Drawbridge Company were citizens of Indiana, was sufficient to give jurisdiction to the Circuit Court of the United States, because the company was incorporated by a public statute of the state, which the court was bound judicially to notice. *Covington Drawbridge Co. v. Shepherd*, 20 How. 227.

21. The former decisions of this court upon the subject examined. *Ib.*

22. (Dec., 1861.) A corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the bounds of the sovereignty by which it is created. It must dwell in the place of its creation. *Ohio & Mississippi Railroad Co. v. Wheeler*, 1 Black, 286.

23. A corporation is not a citizen, within the meaning of the Constitution of the United States, and cannot maintain a suit in a court of the United States against the citizen of a different

state from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that state. *Ib.*

24. In such case they may sue by their corporate name, averring the citizenship of all the members, and such suit would be regarded as the joint suit of individual persons, united together in the corporate body, and acting under the name conferred upon them for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against a citizen of another state. *Ib.*

25. Where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence. *Ib.*

26. A suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the state which created the corporate body; and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States. *Ib.*

27. A corporation endued with the capacities and faculties it possesses by the co-operating legislation of two states cannot have one and the same legal being in both states. Neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. *Ib.*

28. The two corporations deriving their powers from distinct sovereignties, and exercising them within distinct limits, cannot unite as plaintiffs in a suit in a court of the United States against a citizen of either of the states which chartered them. *Ib.*

29. (Dec., 1868.) A municipal corporation created by one state, within its own limits, may be sued in the courts of the United States by the citizens of another state. *Cowles v. Mercer County*, 7 Wall. 118.

30. The statutes of a state limiting the jurisdiction of suits against counties to Circuit Courts held within such counties can have no application to courts of the national government. *Ib.*

31. (Dec., 1871.) Although a corporation, being an artificial body created by legislative power, is not a citizen, within several provisions of the Constitution, yet where rights of action are to be enforced by or against a corporation, it will be considered as a citizen of the state where it was created, within the clause extending the judicial power of the United States to controversies

between citizens of different states. *Railway Co. v. Whitton*, 13 Wall. 270.

32. Where a corporation is created by the laws of a state, it is, in suits brought in a federal court in that state, to be considered as a citizen of such state, whatever its status or citizenship may be elsewhere, by the legislation of other states. *Ib.*

33. (Oct., 1876.) A suit by or against a corporation, in a court of the United States, is regarded as brought by or against its stockholders, all of whom are, for the purposes of jurisdiction, conclusively presumed to be citizens of the state which created it. *Muller v. Dows*, 4 Otto, 444.

34. It should appear by the declaration or bill of complaint that the corporation was created by the state whereof the adverse party is not a citizen; but a defective averment of that fact may be cured by the subsequent pleadings. *Ib.*

35. A corporation created by the laws of Iowa, although consolidated with another of the same name in Missouri, under the authority of a statute of each state, is, nevertheless, in Iowa, a corporation existing there under the laws of that state alone. *Ib.*

36. (Oct., 1877.) . . . A., Dec. 2, 1870, filed, for himself and other note-holders, a bill in the Circuit Court against the receiver of the bank, its cashier, five of its directors, and some sixty others as stockholders, alleging, among other matters, that he was a citizen of Virginia, but making no averment touching the citizenship of the other note-holders or of the defendants. Such citizenship does not appear by the record, and the bank was not made a party. . . . *Held*, 1. That the citizenship of the parties is not sufficiently shown to give the court below jurisdiction. *Godfrey v. Terry*, 7 Otto, 171.

37. (May, 1839.) To entitle a corporation to sue in the Circuit Courts of the United States, all the members of that corporation must be citizens of some state of the United States other than that state of which the defendant is a citizen. And the averments must so be made in the declaration, in order to entitle the court to take jurisdiction of the case. *Bank of Cumberland v. Willis*, 3 Sumn. 472.¹

38. (Oct., 1870.) M., a copartner with D., filed a bill against D. for a dissolution of the copartnership, and an account. The firm had a contract with the S. Co., a corporation, in regard

¹ Agreeing with other cases decided previous to January, 1844.

to the furnishing by it to the firm of marble. A receiver of the copartnership property was appointed. Afterwards, M. filed an amendment and supplement to the bill, alleging a secret agreement by D. with the S. Co., in fraud of the rights of M. under said contract, and a refusal of the S. Co. to furnish marble to the receiver, and making the S. Co. a defendant, and praying a specific performance of said contract by it. M. was a citizen of Ohio. The bill alleged that the S. Co. was a citizen of Vermont. The S. Co. interposed a plea to the jurisdiction of the court over it, alleging that it was a corporation created by Massachusetts. Issue was joined on the plea, and proofs were taken, and the cause was heard thereon as to the S. Co. *Held*, that the court had no jurisdiction of the suit as to the S. Co. *Myers v. Dorr*, 13 Blatchf. 22.

39. A corporation can have no citizenship or inhabitancy out of the state by which it was created, and, under sec. 11 of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 78), cannot be made a party to a civil suit in a Circuit or District Court by original process, in any other district than a district of the state by which it was created. *Ib.*

40. (Dec., 1876.) An administratrix, appointed in New York, sued in this court a New Jersey corporation, to recover, for the benefit of the next of kin of the intestate, damages for the death of the intestate caused by the negligence of the corporation, the right of action being claimed under a statute of New Jersey. *Held*, that the action could not be maintained. *MacKay v. Central Railroad of New Jersey*, 14 Blatchf. 65.

41. (April, 1849.) A Pennsylvania plaintiff may sustain an action in this court, in New Jersey, against a corporation chartered by the latter state, for consequential injuries done to the plaintiff's real property lying in Pennsylvania, the cause of the injury, a canal, being in New Jersey. *Rundle v. The Delaware & Raritan Canal*, 1 Wall. Jr. 275.

42. (Dec., 1862.) If a company be incorporated by two States, a citizen of one of the states may sue it in a United States court in the other state in which it is incorporated. *City of Wheeling v. Mayor of Baltimore*, 1 Hughes, 90.

43. (May, 1871.) In a suit brought in the Circuit Court of the United States by reason of the citizenship of the parties, a corporation of the state, of which the complainant is a citizen, cannot be made a defendant. *Vose v. Reed*, 1 Woods, 647.

44. If the same corporators composing such corporation become incorporated in the state where the suit is brought, the corporation thus formed may be made a defendant. *Ib.*

45. (Nov., 1876.) Where a joint-stock association was organized under the laws of New York, having the privilege of perpetual succession, and the right of making contracts in the name of such association, and of suing and of being sued in the name of its president or treasurer, it is to be deemed a citizen of that state, at least so far that an action can be maintained against it by a citizen of another state in a federal court, without regard to the citizenship of the individual members composing such association. *Maltz v. American Express Co.*, 1 Flipp. 611.

46. (May, 1847.) The Circuit Court takes jurisdiction for or against a corporation, from the place where its business is done. And this sufficiently appears from the face of the act of incorporation. *Vallette v. Canal Company*, 4 McLean, 192.

47. (May, 1849.) A company incorporated by a law of Indiana, and also a law of Illinois, to improve the navigation of the Wabash, which constitutes to some extent the boundary between the two states, the general place of meeting of the directors to do business being in Indiana, the records being kept there, suit may be brought by or against the corporation in that state. *Culbertson v. Wabash Navigation Co.*, 4 McLean, 544.

48. (May, 1853.) A corporation is not amenable to process, except in the state where its business is done. *Railroad Co. v. Railroad*, 5 McLean, 444.

49. A corporation in Indiana cannot sue, in that state, a corporation doing business in the State of Michigan. *Ib.*

50. (April, 1853.) The Circuit Court takes jurisdiction where a suit is brought by a corporation, from the place where it is located and where its corporate functions are discharged. No further allegation of citizenship is required. *New York & Erie Railroad v. Shepard*, 5 McLean, 455.

51. (May, 1853.) By a law of Ohio, all foreign insurance companies which, through an agency, do business in the state, are held amenable to the process of the state. All such companies are liable to be sued, and a service on their agents shall bind the companies which they represent.

Jurisdiction of corporations attaches, in the courts of the United States, from the place where their business is done. *French v. Lafayette Ins. Co.*, 5 McLean, 461.

52. (March, 1869.) It is a presumption which the courts will not allow to be rebutted, that if a corporation has a legal existence in a state, its corporators are citizens of the same state. *National Park Bank v. Nichols*, 4 Biss. 315.

53. (1875.) For the purposes of federal jurisdiction, a corporation is conclusively considered as if it were a citizen of the state which created it. *Williams v. Railway Co.*, 3 Dill. 267.

54. This principle applied, and the defendant company held to be a citizen of the State of Kansas, under whose laws it was organized, and not of Missouri, under whose laws it had gone into that state and purchased and was operating therein a line of railway in connection with its line in Kansas. *Ib.*

55. The case in judgment considered to be analogous to that of the *Baltimore & Ohio Railroad Co. v. Harris*, 12 Wall. 65, and distinguishable from the *Ohio & Mississippi Railroad Co. v. Wheeler*, 1 Black, 236. *Ib.*

56. (March, 1880.) Sec. 5359 of the Revised Statutes of the State of Missouri, which provides that "all actions whatsoever, against any county, shall be commenced in the Circuit Court of such county," &c., does not deprive the federal courts of jurisdiction in an action against a county of such state brought by a citizen of another state. *Cunningham v. County of Ralls*, 1 McCrary, 117.

Jurisdiction. Assignee of Chose in Action.

1. (Feb., 1810.) A general assignee of the effects of an insolvent cannot sue in the federal courts if his assignor could not have sued in those courts. *Sere v. Pitot*, 6 Cranch, 332.

2. (Feb., 1821.) The Circuit Court has jurisdiction of a suit brought by the indorsee of a promissory note who is a citizen of one state, against the indorser, who is a citizen of a different state, whether a suit could be brought in that court by the indorsee against the maker or not. *Young v. Bryan*, 6 Wheat. 146.

3. (Feb., 1824.) An indorsee of a promissory note, who resides in a different state, may sue, in the Circuit Court, his immediate indorser, residing in the state in which the suit is brought, although that indorser be a resident of the same state with the maker of the note. *Mollan v. Torrance*, 9 Wheat. 537.

4. But where the suit is brought against a remote indorser,

and the plaintiff, in his declaration, traces his title through an intermediate indorser, he must show that this intermediate indorser could have sustained his action in the Circuit Court. *Id.*

5. (Jan., 1829.) The bills of the bank were payable to an individual or bearer, and in the action upon the bills there was no averment of the citizenship of the person to whom the bills are payable, and they might therefore have been payable in the first instance to a party not competent to sue in the courts of the United States. This court has uniformly held that a note payable to bearer is payable to anybody, and is not affected by the disabilities of the nominal payee. *Bank of Kentucky v. Wister*, 2 Pet. 319.

6. (Jan., 1829.) Bills of exchange drawn in one state of the Union, on persons living in another state, partake of the character of foreign bills, and ought to be so treated in the courts of the United States.

For all national purposes embraced by the federal Constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign and independent of each other. *Buckner v. Finley*, 2 Pet. 586.

7. (Jan., 1828.) It cannot be alleged that a citizen of one state, having title to lands in another state, is disabled from suing for those lands in the courts of the United States, by the fact that he derives his title from a citizen of the state in which the lands lie. *McDonald v. Smalley*, 4 Pet. 620.

8. (Jan., 1832.) H. and D., citizens of Tennessee, gave their promissory note to T. R. & Co., also citizens of Tennessee, payable in fifteen months. Before the note became due, T. R. & Co. removed to, and became citizens of, Alabama, and also before the day appointed for the payment of the note indorsed it to K., a citizen of Alabama; and in the declaration on the note the plaintiff averred that T. R. & Co. were citizens of Alabama. *Held*, that the Circuit Court of Tennessee had jurisdiction of the suit, under the eleventh section of the act of 1789. The payees of the note having, before the note became due, become citizens of Alabama, could have prosecuted a suit on the note in the Circuit Court of Tennessee, if no assignment had been made. *Kirkman v. Hamilton*, 6 Pet. 20.

9. (Jan., 1842.) No suit against the drawers of the note

could be maintained in the Circuit Court. The eleventh section of the Judiciary Act of 1789 allows suits on promissory notes to be brought in the courts of the United States, in cases only where the suit could have been brought in such court if no assignment had been made. The makers and payee of the note having been citizens of Mississippi, the Circuit Court had no jurisdiction of a suit against the makers. Between Lacoste, the indorser, and the plaintiffs below, it was different; for, on his indorsement to citizens of another state, he was liable to a suit by them in the Circuit Court. But the joining of those who could not be sued in the Circuit Court, with the indorser, made the whole action erroneous. The action was founded on distinct and independent contracts. *Keary v. Farmers' & Merchants' Bank*, 16 Pet. 89.

10. (Jan., 1842.) The Circuit Courts of the United States have not cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made; except in cases of foreign bills of exchange. *Gibson v. Chew*, 16 Pet. 315.

11. (Jan., 1844.) A statute of Mississippi allows suit to be brought against the maker and payee, jointly, of a promissory note, by the indorsee. But an action of this kind cannot be maintained in the courts of the United States, although the plaintiff resides in another state, provided the maker and payee of the note both reside in Mississippi. *Dromgoole v. Farmers' & Merchants' Bank*, 2 How. 241.

12. (Jan., 1845.) The Circuit Court of the United States has jurisdiction where a promissory note is made by a citizen of one state, payable to another citizen of the same state or bearer, and the party bringing the suit is a citizen of a different state; although upon the face of the note it was expressed to be for the use of persons residing in the state in which the maker and payee lived. *Bonnafée v. Williams*, 3 How. 574.

13. Where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. *Id.*

14. (Jan., 1847.) In a suit by the first indorser of promissory notes, against a second indorser, upon an alleged contract that

the second indorser would bear half the loss, which might accrue from their non-payment by the drawer, it is not a sufficient objection to the jurisdiction of the court that the second indorsee and defendant were citizens of the same state. Such an objection would be well founded if the suit had been upon the notes. *Phillips v. Preston*, 5 How. 278.

15. But not where the suit is brought upon a collateral contract. *Ib.*

16. (Jan., 1850.) Courts created by statute can have no jurisdiction but such as the statute confers. *Sheldon v. Sill*, 8 How. 441.¹

17. Therefore, where the third article of the Constitution of the United States says that the judicial power shall have cognizance over controversies between citizens of different states, but the act of Congress restrains the Circuit Courts from taking cognizance of any suit to recover the contents of a chose in action, brought by an assignee, when the original holder could not have maintained the suit, this act of Congress is not inconsistent with the Constitution. *Ib.*

18. A debt secured by bond and mortgage is a chose in action. *Ib.*

19. Therefore, where the mortgagor and mortgagee resided in the same state, and the mortgagee assigned the mortgage to a citizen of another state, this assignee could not file his bill for foreclosure in the Circuit Court of the United States. *Ib.*

20. (Dec., 1851.) By the eleventh section of the Judiciary Act (1 Stat. at Large, 78), no action can be brought in the federal courts, upon a promissory note or other chose in action, by an assignee, unless the action could have been maintained if there had been no assignment. But an indorsee may sue his own immediate indorser. *Coffee v. Planters' Bank*, 13 How. 183.

21. Hence, where an action was brought by an indorsee upon checks which had been indorsed from one person to another, in the same state, and some of the counts of the declaration traced the title through these indorsements, no recovery could have been had upon those counts. *Ib.*

22. But the declaration also contained the common money counts; and, upon the trial, these were the only counts which remained, all the rest having been stricken out. The suit against

¹ This case overrules *Dundas v. Bowler*, 3 McLean, 204.

the maker, and also against all the indorsers except one, had been discontinued. *Ib.*

23. The statute of the state where the trial took place authorized a suit upon such an instrument as if it were a joint and several contract. *Ib.*

24. The dismissal of the suit against all the indorsers except one, and the striking out of all the counts against him except the common money counts, freed the judgment against him from all objection; and, therefore, when brought up for review upon a writ of error, it must be affirmed. *Ib.*

25. (Dec., 1853.) The eleventh section of the Judiciary Act of 1789 says, "Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

This clause has no application to the case of a suit by the assignee of a chose in action, to recover possession of the thing in specie, or damages for its wrongful caption or detention. *Deshler v. Dodge*, 16 How. 622.

26. Therefore, where an assignee of a package of bank-notes brought an action of replevin for the package, the action can be maintained in the Circuit Court, although the assignor could not himself have sued in that court. *Ib.*

27. (Dec., 1858.) Bonds issued by a railroad company in Massachusetts, payable in blank, no payee being inserted, and issued to a citizen of Massachusetts, which had passed through several intervening holders, could be filled up by a citizen of New Hampshire, payable to himself or order, and then suit could be maintained upon them in the Circuit Court of the United States for Massachusetts. *White v. Vt. & Mass. Railroad Co.*, 21 How. 575.

28. The eleventh section of the Judiciary Act does not apply to such a case. *Ib.*

29. The usage and practice of railroad companies, and of the capitalists and business men of the country, and decisions of courts, have made this class of securities negotiable instruments. *Ib.*

30. The later English authorities, upon this point, overruled. *Ib.*

31. (Dec., 1869.) In a suit brought by the assignee of a chose in action, in the federal court, on the contract so assigned, it is necessary that the plaintiff shall show affirmatively that such action could have been sustained if brought by the original obligee. *Bradley v. Rhines*, 8 Wall. 393.

32. The burden of proof in such case is on the plaintiff, when the instrument and its assignment are offered, under the plea of the general issue. *Ib.*

33. (Dec., 1871.) The restriction of the eleventh section of the Judiciary Act, giving original jurisdiction to the Circuit Courts, but providing that they shall not "have cognizance of any suit to recover the contents of any promissory note or *other chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made," does not apply to cases transferred from state courts under the act of March 2, 1867, giving to either party, in certain cases, a right to transfer a suit brought in a state court, where either makes affidavit, &c., "that, he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such court." *City of Lexington v. Butler*, 14 Wall. 282.

34. Independently of this, negotiable paper (within which class coupons to municipal bonds, if having proper words of negotiability, fall) is not regarded as falling within the exception. *Ib.*

35. (Oct., 1873.) Where a citizen of one state, as indorsee of inland bills, drawn or accepted by a citizen of another,—the plaintiff claiming through the indorsement of the payee, or of the payee and subsequent indorsers,—sues the drawer or acceptor, in the Circuit Court, the eleventh section of the Judiciary Act requires that the citizenship of such payee and subsequent indorsers be alleged to be different from that of the defendant. It is not enough to allege that the plaintiff is a citizen of one state, and the defendant of another. *Morgan v. Gay*, 19 Wall. 81.

36. (Oct., 1817.) Upon a bank-note payable to *W. Pitt* or bearer the Circuit Court has jurisdiction to enforce payment in favor of a holder who is a citizen of another state, although it is not shown that *W. Pitt* is a fictitious person, or a citizen of another state; the prohibition of the act of the 24th September, 1789, ch. 20, s. 11, not applying to such a note. *Bullard v. Bell*, 1 Mason, 243.

37. (Oct., 1835.) The Judiciary Act of 1789, ch. 20, s. 11, contains the following exception: "Nor shall any District or Circuit Court have cognizance of any suit, to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of bills of exchange." *Held*, that this does not apply, either directly or constructively, to a conveyance of lands from a citizen of one state to a citizen of another state. *Briggs v. French*, 2 Sumn. 252.

38. *Quære*, as to the authority of the cases, *Maxwell's Lessee v. Levy* (2 Dall. R. 381; S. C. 4 Dall. R. 330), and *Hurst's Lessee v. McNeil* (1 Wash. C. C. R. 70, 83). *Ib.*

39. (Oct., 1846.) If, at the trial, the plaintiff proves his case by a note from the defendants to a third person, promising to pay money to him, or order, and proves the indorsement by him to the plaintiff, this court still has jurisdiction, if the original promisee was a citizen of Rhode Island, and could sustain an action on the note without its being assigned or indorsed. *Brown v. Noyes*, 2 Woodb. & M. 75.

40. (Oct., 1847.) Where a company to dig and sell coal was incorporated in the State of Pennsylvania, and sold coal in Massachusetts, by its agents, Thwing & Co., to the defendant, a citizen of this state [Massachusetts], and Thwing & Co. took a promissory note for the price, running to them "*as agents*" for the company, or order, and then indorsed it to the plaintiff, a citizen of New York, and president of the company, the case, on the face of the record, having money counts, as well as a special count on the note, gives jurisdiction to this court. *Heckscher v. Binney*, 3 Woodb. & M. 333.

41. The corporation having been chartered in another state, and all its members residing out of this state, could recover here on the money counts, or on the note as it stood before indorsed; and hence they can probably recover on those counts for the original consideration, in the name of the plaintiff, if an amendment was made adding that he sues in their behalf, and as their president. *Ib.*

42. But such a recovery could not be had on the special count on the note, by him as indorsee, without averring in the declaration, also, that the note was payable to the Thwings, as their

agents, and that they could have sued in this court without any assignment of the note. *Ib.*

43. Again, there seems to be no valid objection to a recovery by the plaintiff in this case, on the money counts, as the declaration now stands, without amendment, the note being proof of money had in favor of an indorsee, as well as payee, and this court having had jurisdiction over it originally, as payable to the agents of the coal company, and hence recoverable in their names, in this court, without an assignment, they belonging to another state. *Ib.*

44. (June, 1856.) An assignee of a right to an account of the proceeds of sales of mortgaged property cannot maintain a suit in the Circuit Court of the United States, in a case where his assignors were not competent, on the ground of citizenship, to sue the defendants. *Wilkinson v. Wilkinson*, 2 Curt. C. C. 582.

45. (Nov., 1862.) A suit to recover damages from a corporation, for its breach of an implied contract, in neglecting to protest and give notice in regard to certain drafts forwarded to it by a correspondent bank, such suit being brought by an assignee of the right of action, is not, within the meaning of the eleventh section of the Judiciary Act of Sept. 24, 1789, a suit to recover the contents of a chose in action in favor of an assignee. *Barney v. Globe Bank*, 5 Blatchf. 107.

46. (June, 1876.) The holder of a coupon payable to bearer is not an assignee of the cause of action, within the first section of the act of March 3, 1875 (18 Stat. at Large, 470). *Cooper v. Town of Thompson*, 13 Blatchf. 435.

47. (Aug., 1879.) The decision in *Codman v. Vermont & Canada Railroad Co.* (16 Blatchf. C. C. R. 165) adhered to. *Codman v. Vermont & Canada Railroad Co.*, 17 Blatchf. 1.

48. This suit being against the indorser of the notes, and the indorsement having been filled up when it was made, and ordering the contents of the notes to be paid to the bearer, and this having been done before the notes were put into circulation, the contract of the indorser was with the bearer, and no disability of the bearer to sue, as an assignee, could arise under sec. 11 of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 79), now sec. 629 of the Revised Statutes. *Ib.*

49. (May, 1880.) The holder of a coupon cut from a town bond, payable to bearer, is not an assignee of the cause of action,

within sec. 1 of the act of March 3, 1875 (18 Stat. at Large, 470). *Pettit v. The Town of Hope*, 18 Blatchf. 180.

50. (April, 1823.) An executor or administrator is not an assignee within the meaning of the eleventh section of the Judiciary Act of 1789. *Mayer v. Foulkrod*, 4 Wash. 349.

51. (Oct., 1824.) The assignee of a bail-bond is not such an assignee of a chose in action as is contemplated by the eleventh section of the Judiciary Act of 1789. *Bobyshall v. Oppenheimer*, 4 Wash. 482.

52. (Oct., 1852.) In suing on a chose in action, if the plaintiff be not a citizen of the same state as the defendant, his right to sue is not taken away by the fact that the chose may have passed to him through the hands of persons who were citizens of that state, and so unable to prosecute a suit in this court, provided the party to whom the chose was originally given was not such a citizen, and could himself have, therefore, prosecuted such a suit. *Milledollar v. Bell*, 2 Wall. Jr. 334.

53. (July, 1843.) The assignee of a mortgage may file a bill of foreclosure in the federal court, though his assignor could not have done so. *Dundas v. Bowler*, 3 McLean, 204.¹

54. Such a bill acts upon the estate as directly as an action of ejectment. *Ib.*

55. An ejectment may be brought by the assignee of the mortgage, and the jurisdiction of the court cannot be doubted. *Ib.*

56. The Constitution gives jurisdiction where the parties live in different states; and in so far as the eleventh section of the act of 1789 is restrictive of this right, it is in conflict with the Constitution. *Ib.*

57. This has not been so ruled heretofore; but the attention of the court does not seem to have been strongly directed to the point. *Ib.*

58. The restriction of the above section seems to have been designed to act upon negotiable paper. *Ib.*

59. It has been construed to extend to other choses in action. But no decision has gone so far as to exclude the jurisdiction of this court on a bill to foreclose a mortgage by the assignee of the mortgagee, being a citizen of another state. *Ib.*

60. Such a bill acts upon the land, and the assignment of a mortgage is not within the above section. *Ib.*

¹ Overruled: *Sheldon v. Sill*, 8 How. 441.

61. (June, 1846.) The eleventh section of the Judiciary Act of 1789 declares that jurisdiction may be exercised by the Circuit Court, between citizens of different states. But in the same section there is an exception, that where suit is brought in favor of an assignee, there shall be no jurisdiction, unless suit could have been brought in the courts of the United States, on such notes, had no assignment been made. This is a restriction on the provision of the second section of the third article of the Constitution, which declares that jurisdiction shall be exercised between citizens of different states. *Assignee of Brainard & Geoffray v. Williams*, 4 McLean, 122.¹

62. And yet this provision has been sustained by the Supreme Court since its organization. *Ib.*

63. This part of the act should have been declared to be unconstitutional. Congress might have provided against fraudulent assignments to give jurisdiction. *Ib.*

64. (June, 1847.) A note assigned by a bank in Michigan to a citizen of another state, to give jurisdiction to this court, cannot be prosecuted in this court [Circuit Court of the United States for the District of Michigan.] *Wells v. Newberry*, 4 McLean, 226.

65. The bank, the assignor, could not sue, consequently, under decisions, the assignee could not sue in this court. *Ib.*

66. (Oct., 1850.) This court can exercise no jurisdiction in a case where the maker and indorser of a note, at the time of the assignment, resided in the state where the action is brought. *Small v. King*, 5 McLean, 147.

67. If the indorser be an accommodation indorser, and the note never went into his possession or ownership, it can make no difference. *Ib.*

68. (Oct., 1853.) Where a mortgage was executed in Massachusetts, to secure the payment of promissory notes also made there, for land in Illinois, and the payee of the note, then a citizen of Massachusetts, assigned them to the plaintiff, and continued to reside in that state till after cause of action had accrued on the notes, but before suit brought, the payee moved to Illinois, and at the time of the commencement of the suit was a citizen of Illinois, — *Held*, that the case was within the eleventh section of the Judiciary Act of 1789, and that the court had no jurisdiction. *Thaxter v. Hatch*, 6 McLean, 68.

¹ See *Sheldon v. Sill*, 8 How. 441; and *Dundas v. Boulter*, 3 McLean, 204.

69. When the courts of the United States once acquire jurisdiction by virtue of the citizenship of the parties, it cannot be ousted by a change of residence; but this applies only where jurisdiction has vested by a suit. *Ib.*

70. The limitation of the eleventh section of the Judiciary Act is confined to the time when the suit is commenced. *Ib.*

71. (Jan., 1859.) The United States courts have not jurisdiction of a bill of foreclosure by the assignee of a mortgage, where the mortgagor and mortgagee are citizens of the same state. *Hill v. Winne*, 1 Biss. 275.

72. A mortgage is a chose in action within the meaning of the eleventh section of the Judiciary Act. *Ib.*

73. The rule that a promissory note payable to bearer is excepted from the prohibition of this section does not apply to an accompanying mortgage. *Ib.*

74. Doubtful jurisdiction not entertained. *Ib.*

75. (April, 1869.) The assignee of a promissory note (being otherwise competent) may maintain an action upon it if the assignor might have done so at the time of the commencement of the suit. *Chamberlain v. Eckert*, 2 Biss. 126.

76. The payee, a resident of the same state with the maker at the time the note was given, but having removed therefrom, may maintain an action in this court. *Ib.*

77. The words in the eleventh section of the Judiciary Act of 1789, "unless a suit might have been prosecuted . . . if no assignment had been made," refer to the time when the suit was commenced, not the time of the assignment. *Ib.*

78. It is not necessary that it should appear that the assignor could have brought suit upon it before assignment. *Thaxter v. Hatch*, 6 McLean, 68, approved. *Ib.*

79. *It seems* that if the payee, after the maturity of the note, and before suit brought, had become a citizen of the same state, the federal courts could not sustain jurisdiction. *Ib.*

80. (Jan., 1877.) Under the act of March 3, 1875, the United States Circuit Courts have jurisdiction of a bill to foreclose a mortgage in behalf of a non-resident assignee of such mortgage, though the assignor could not, by reason of citizenship, have filed such bill. *Seckel v. Backhaus*, 7 Biss. 354.

81. (1874.) Under the eleventh section of the Judiciary Act, the assignee of a chose in action may sue in the federal

court, if the assignor might, at the time suit was brought, have there prosecuted the suit if no assignment had been made; and this, although the assignor was, at the time the assignment was made, a citizen of the same state with the maker. *White v. Leahy*, 3 Dill. 378.

82. (April, 1847.) An indorsee of a writing obligatory, who is a citizen of another state, may sue his immediate indorser in the Circuit Court, whether the maker is suable in such court or not, because the indorsement is regarded as a new contract, and is not within the prohibition of the eleventh section of the Judiciary Act of 1789. *Campbell v. Jordan*, Hempst. 534.

83. (Sept., 1879.) Since the act of March 3, 1875, an assignee of a chose in action, not founded on contract, may sue without showing that the citizenship of his assignor was such as would have given the Circuit Court jurisdiction had such assignor sued. *Van Bokkelen v. Cook*, 5 Sawyer, 587.

Jurisdiction. Colorable Conveyance.

1. (April, 1797.) On a rule to show cause why this ejectment, and many other cases depending on the same principle, should not be struck off the record, upon a suggestion that the court had no jurisdiction, it appeared that the lessor of the plaintiff was a citizen of Maryland, resident there, and that the defendant was a citizen of Pennsylvania, resident here. But as soon as the ejectment was instituted, a bill for discovery was filed against the lessor of the plaintiff, on the equity side of the court, in which it was alleged "that the conveyance of the premises in controversy to the lessor of the plaintiff was made by Morris, a citizen of Pennsylvania, for no other purpose than to give jurisdiction to the Circuit Court;" and the answer to the bill admitted "that the lessor of the plaintiff had given no consideration for the conveyance; that his name had been used by way only of accommodation to Morris;" but it was not directly said that it was for the purpose of creating a jurisdiction in the federal court.

. . . The conveyance to the lessor of the plaintiff was considered as entirely colorable and collusive, and therefore incapable of laying a foundation for the jurisdiction of the court. *Maxwell's Lessee v. Levy*, 2 Dall. 381.

2. (April, 1797.) A colorable and collusive conveyance to the lessee of the plaintiff in ejectment, for the purpose of bringing the suit in the federal court, will not give it jurisdiction, and the court will, on motion, dismiss the suit. *Maxfield's Lessee v. Levy*, 4 Dall. 308.

3. (Jan., 1828.) M., a citizen of Ohio, apprehensive his title to lands in that state could not be maintained in the state court, and being indebted to the plaintiff, a citizen of Alabama, to the amount of \$1,100, offered to sell and convey to him the land in payment of the debt, stating in the letter by which the offer was made that the title would most probably be maintained in the courts of the United States, but would fail in the courts of the state. The property was estimated at more than the debt; but, in consequence of the difficulties attending the title, he was willing to convey it for the debt, which was done. The plaintiff in error, after the land was conveyed to him, gave his bond to make a quitclaim title to the land on condition of receiving \$1,000. *Held*, that the title acquired by the purchaser gave jurisdiction to the courts of the United States. *McDonald v. Smalley*, 1 Pet. 620.

4. The motives which induced M. to make the contract for the purchase of the land, can have no influence on its validity. A court cannot enter into a consideration of those motives when deciding on its jurisdiction. *Ib.*

5. (Jan., 1849.) When a mortgagor and mortgagee are citizens of the same state, and the mortgagee assigns the mortgage to a citizen of another state, for the purpose of throwing the case into the Circuit Court, it is necessary, in order to divest the court of jurisdiction, to bring home to the assignee a knowledge of this motive and purpose. Till then he must be considered an innocent purchaser without notice. *Smith v. Kernschen*, 7 How. 198.

6. If the assignment was only fictitious, then the suit would in fact be between two citizens of the same state, over which the court would have no jurisdiction. *Ib.*

7. The question of jurisdiction in such a case should have been raised by a plea in abatement. Upon the trial of the merits it was too late. *Ib.*

8. (Dec., 1867.) Although the simple fact that a transfer or conveyance of the subject of controversy is made for the pur-

pose of vesting an interest in parties competent to litigate in the federal courts, does not defeat the jurisdiction if the transaction vests the real interest in the grantee or assignee, yet, if the conveyance or assignment is colorable only, and the real interest remains in the grantor or assignor, the court cannot entertain jurisdiction of the case. *Barney v. Baltimore City*, 6 Wall. 280.

9. (Dec., 1866.) Where a plaintiff has otherwise a right to sue, by virtue of his citizenship, in a court of the United States, it is no objection to the jurisdiction of the court that he acquired the title on which he sues, for the purpose of enabling him to bring the suit. *Osborne v. Brooklyn City Railroad Co.*, 5 Blatchf. 366.

10. (April, 1804.) A deed executed for the purpose of giving jurisdiction to the federal court will not be countenanced so as to sustain the jurisdiction. *Hurst's Lessee v. M'Neil*, 1 Wash. 70.

11. (Oct., 1806.) Ejectment. If the plaintiff has a right to claim the jurisdiction of the Circuit Court under the law, a deed which is not intended to give, and which does not give, jurisdiction to the court, cannot be said to be given in fraud of the law, merely because it changes the nature of the suit which the plaintiff has a right to maintain in the courts of the United States. *Lessee of Browne v. Arbuckle*, 1 Wash. 484.

12. (March, 1863.) Conveyances of the interests of non-residents, made merely for the purpose of giving the Circuit Courts jurisdiction, do not suffice that purpose. *Barney v. Baltimore*, 1 Hughes, 118.

13. (Oct., 1851.) Where, from the facts of the case, a conveyance of land appears to be only colorable, with the view to give jurisdiction to the courts of the United States, the writ will be dismissed on motion, or on a plea. *Starling v. Hawks*, 5 McLean, 318.

14. If the suit is to be prosecuted under the direction of the grantor, and at his expense, and where he has the option within a stipulated time to take back the land on returning the bond; and where a similar right is given to the grantee, it is sufficient to show that the object of the conveyance was to give jurisdiction to the Circuit Court of the United States, and for the benefit of the grantor. *Ib.*

15. (April, 1853.) A deed fair upon its face is not objection-

able as a colorable conveyance to give jurisdiction, unless proof be shown *aliunde*. *Hotchkiss v. Glasgow*, 5 McLean, 424.

Jurisdiction. Suits in Equity by the United States.

1. (Feb., 1819.) The Circuit Court has jurisdiction, on a bill in equity filed by the United States, against the debtor of their debtor, they claiming a priority under the act of 1799, ch. 128, s. 65, notwithstanding the local law of the state where the suit is brought allows a creditor to proceed against the debtor of his debtor by a peculiar process of law. *United States v. Howland*, 4 Wheat. 108.

2. (Aug., 1871.) Under the eleventh section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 78), this court has jurisdiction of a creditor's bill, brought by the United States, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars. *United States v. Stiner*, 8 Blatchf. 544.

3. (Sept., 1873.) The United States have the right to prevent the construction of bridges across the Mississippi River otherwise than as prescribed by Congress; and the federal courts have jurisdiction for that purpose. *United States v. Railway Co.*, 5 Biss. 410.

4. (Sept., 1873.) The federal courts have jurisdiction of a suit by the United States, to restrain the placing of obstructions in its navigable waters. *United States v. Railway Co.*, 5 Biss. 420.

5. (June, 1874.) Where patents for lands have been issued without authority of law, the United States may, in their own name, maintain a bill in equity, in the Circuit Court, to annul and set aside the patents. *United States v. Railroad Co.*, 1 McCrary, 610.

6. On a construction of the treaty of the United States with the Osage Indians, of June 2, 1825 (7 Stat. 240), and the subsequent treaty with the same Indians, proclaimed Jan. 21, 1867 (14 Stat. 687), and of the act of Congress of March 3, 1863 (12 Stat. 772), granting lands to the State of Kansas to aid in the building of railroads, — *Held*, that lands which, under the said treaty of 1825, had been set apart and reserved for the said Indian tribe, and which were in their actual use and occupancy,

did not pass under the said railroad grant, and that the United States were entitled to have cancelled patents which had issued to the railroad company under the erroneous assumption that the lands were embraced in the railroad grant. *Ib.*

7. See also *United States v. The Missouri, Kansas, & Texas Railway Co.*, 1 McCrary, 624.

Jurisdiction. Suits at Common Law by the United States or Officers.

1. (Feb., 1818.) Where a bill of exchange was indorsed to T. T. T., treasurer of the United States, who received it in that capacity, and for account of the United States, and the bill had been purchased by the Secretary of the Treasury (as one of the commissioners of the sinking fund, and as agent of that board), with the money of the United States, and was afterwards indorsed by T. T. T., treasurer of the United States, to W. & S., and by them presented to the drawees for acceptance, and protested for non-acceptance and non-payment, and sent back by W. & S. to the Secretary of the Treasury, — *Held*, that the indorsement to T. T. T. passed such an interest to the United States as enabled them to maintain an action on the bill against the first indorser. *Dugan v. United States*, 3 Wheat. 172.

2. (Jan. 1827.) The Circuit Courts of the Union have jurisdiction, under the Constitution, and the acts of April 30, 1810, ch. 262, s. 29, and of March 3, 1815, ch. 782, s. 4, of suits brought in the name of the "Postmaster-General of the United States," on bonds given to the Postmaster-General by a deputy postmaster, conditioned "to pay all moneys that shall come into his hands for the postages of whatever is by law chargeable with postage, to the Postmaster-General of the United States for the time being, deducting only the commissions and allowances made by law for his care, trouble, and charges, in managing the said office," &c. *Postmaster-General v. Early*, 12 Wheat. 136.

3. (Jan., 1827.) But a suit at common law may be instituted in the District or Circuit Courts, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or to recover damages for the illegal taking or detaining the same. *United States v. 350 Chests of Tea*, 12 Wheat. 487.

**Jurisdiction. Suits under Import, Internal Revenue, and
Postal Laws.**

1. (March, 1827.) The Circuit Courts of the Union have jurisdiction, under the Constitution, and the acts of April 30, 1810, ch. 262, s. 29, and of March 3, 1815, ch. 782, s. 4, of suits brought in the name of the "Postmaster-General of the United States," on bonds given to the Postmaster-General by a deputy postmaster, conditioned "to pay all moneys that shall come into his hands for the postages of whatever is by law chargeable with postage, to the Postmaster-General of the United States for the time being, deducting only the commissions and allowances made by law for his care, trouble, and charges, in managing the said office," &c. *Postmaster-General v. Early*, 12 Wheat. 136.

2. (Dec., 1866.) The jurisdiction of the Circuit Courts in original suits between citizens of the same state, in internal revenue cases, conferred or made clear by the act of June 30, 1864, "to provide internal revenue," &c. (13 Stat. at Large, 241), was taken away by the act of July 13, 1866, "to reduce internal taxation, and to amend an act to provide internal revenue," &c. (14 id. 172). And suits originally brought in the Circuit Courts, and pending at the passage of this act, fell. *Insurance Co. v. Ritchie*, 5 Wall. 541.

3. (Dec., 1869.) The jurisdiction of suits between citizens of the same state, in internal revenue cases, conferred by the act of March 2, 1833, "further to provide for the collection of duties on imports" (4 Stat. at Large, 632), and the act of June 30, 1864, "to provide internal revenue," &c. (13 id. 241), was taken away by the act of July 13, 1866, "to reduce internal taxation, and to amend an act to provide internal revenue," &c. (14 id. 172). *Insurance Company v. Ritchie* (5 Wall. 541), affirmed. *Hornthall v. The Collector*, 9 Wall. 560.

4. (Dec., 1872.) *Trespass* will not lie against a collector of internal revenue, for improperly seizing and carrying away goods as forfeited, where, on information afterwards filed, the marshal has returned that *he* has seized and attached them, and where, after a trial absolving them, a certificate of probable cause has been granted, under the eighty-ninth section of the act of Feb. 24, 1807, and where the owner of the goods has never made any claim of the collector for them, except by bringing the action of trespass. *Averill v. Smith*, 17 Wall. 82.

5. (April, 1857.) *Semble*, that, on a redelivery bond, given to the United States, under sec. 4 of the act of May 28, 1830 (4 Stat. at Large, 410), in the penalty of \$20,000, on which the estimated value of the entry is indorsed as \$3,357, and by a stipulation in which its penalty is to be deemed double that sum, it is not necessary that the United States should recover \$20,000, if entitled to recover at all, where the goods not redelivered are worth less than such estimated value. *Powell v. Redfield*, 4 Blatchf. 45.

6. Where a suit on such a bond is pending in the District Court, this court has no authority, on a bill filed by the obligors in the bond, against the collector and the district attorney, to restrain them from prosecuting that suit, or to determine in advance how much may legally be recovered in it. *Ib.*

7. Nor, on such a bill, can this court interfere with another suit pending in the District Court to condemn the goods specified in the entry as forfeited to the United States, because of fraud or undervaluation in their invoice. *Ib.*

8. Nor, on such a bill, can this court compel the defendants to elect between such two suits, on the apprehension that there may be a recovery in the suit on the bond, for the non-delivery of goods which may be condemned as forfeited in the other suit. *Ib.*

9. A court of equity has no right to interfere with the strict legal rights of the United States under the revenue laws. Relief against the injustice of enforcing their provisions in respect to penalties and forfeitures, must proceed from the Treasury Department. *Ib.*

10. (June, 1875.) An action against a collector of customs, to recover back money paid as duties, and alleged to have been illegally exacted, can be brought in the Circuit Court, although the parties are residents of the same state. *Schneider v. Barney*, 13 Blatchf. 38.

Jurisdiction. Condemnation of Property used for Insurrectionary Purposes.

1. (Dec., 1867.) The act of Aug. 6, 1861, "to confiscate property used for insurrectionary purposes" (which act declares that such property shall be the lawful subject of *prize and cap-*

ture, and that such prizes and captures shall be condemned in the *District or Circuit Court*, . . . having jurisdiction, or in *admiralty*, in any district in which they may be seized, or into which they may be taken, and that the Attorney-General "may institute the proceedings of condemnation"), extended to all descriptions of property, real or personal, on land or on water. *Union Insurance Co. v. United States*, 6 Wall. 759.

2. The Circuit Court has jurisdiction, under that act, of proceedings for the condemnation of real estate, or property on land; and such proceedings may be shaped in *general* conformity to the practice in admiralty; that is to say, they may be in the form and modes analogous to those used in admiralty. But issues of fact, on the demand of either party, must be tried by jury; such cases differing from cases of seizure made on navigable waters where the course of admiralty may be *strictly* observed. *Ib.*

3. (Oct., 1877.) Until some provision was made by law, for the condemnation of property in land of persons engaged in the rebellion, the courts of the United States could not decree a confiscation of it, and direct a sale. *Conrad v. Waples*, 6 Otto, 279.

4. (April, 1872.) Although proceedings for confiscation of lands are proceedings at law, and are to be reviewed by writ of error, yet proceedings by way of intervention in the course thereof, setting up a lien on the property, are often in the nature of a bill in equity, and may be reviewed by way of appeal. *The Confiscation Cases*, 1 Woods, 221.

Jurisdiction. Suits under Slave-trade Laws.

1. (Feb., 1805.) The question of forfeiture of a vessel under the act of Congress against the slave-trade is of *admiralty and maritime* jurisdiction. *United States v. Schooner Sally*, 2 Cranch, 405.

2. (Nov., 1861.) A vessel was seized under the act of March 22, 1794, as being fitted and prepared for the slave-trade. At the time of the service of the monition by the United States marshal, she was in the possession of a state sheriff, by virtue of an attachment issued from a state court. *Held*, that this court still had jurisdiction, because forfeiture of a vessel arises from the wrongful act of the owner, or some person in charge of the vessel;

and wherever the forfeiture is made absolute by an act of Congress, the forfeiture attaches at the time the wrongful act is committed, and consequently the owner is divested of his title *eo instante*, and the same becomes vested in the United States. *United States v. Bark Reindeer*, 2 Cliff. 57.

3. Under the first section of the act of March 22, 1794, a vessel is liable to be prosecuted and condemned for engaging in the slave-trade in any of the Circuit or District Courts where the vessel may be found and seized. Therefore, where a vessel had been fitted and prepared for a traffic of this kind in New York, it was held that she was properly condemned by the District Court of Rhode Island, having been seized there. *Ib.*

4. (Oct., 1855.) Ownership of the vessel by a citizen of the United States, if the accused be not himself a citizen; or citizenship of the accused, if the ownership be not by such citizen,—is an essential ingredient in maintaining a prosecution under the fourth and fifth sections of the act of May 15, 1820, for suppressing the slave-trade. *United States v. Darnaud*, 3 Wall. Jr. 143.

5. Citizenship, within the meaning of this act, is not what may be called citizenship of domicile, nor is it such citizenship as has been claimed by diplomatic assertion under our naturalization laws, for one who has formally declared his *intention* to become a citizen, without having proceeded further. But it is that citizenship which has a plain, simple, every-day meaning; that unequivocal relation between every American and his country which binds him to allegiance and pledges to him protection. *Ib.*

Jurisdiction. Patent and Copyright Suits.

1. (Dec., 1852.) And when the machine passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress. And if his right to the implement or machine is infringed, he must seek redress in the courts of the state, according to the laws of the state, and not in the courts of the United States, nor under the law of Congress granting the patent. The implement or machine becomes his private, individual property, not protected by the laws of the United States, but by the laws of the state in which it is situated. Contracts in relation to it are regulated by the laws of the state,

and are subject to state jurisdiction. It was so decided in this court in the case of *Wilson v. Sanford and others*, 10 How. 99. *Bloomer v. McQuewan*, 14 How. 549, 550.

2. (Dec., 1854.) But the penalties imposed by the seventh section of the act of Congress passed on the 3d of February, 1831, namely, the forfeiture of the printed copies, and the sum of one dollar for each sheet unlawfully printed, cannot be enforced in a court of equity. *Stevens v. Gladding*, 17 How. 448.

3. (Oct., 1878.) A suit between citizens of the same state cannot be sustained in the Circuit Court, as arising under the patent laws of the United States, where the defendant admits the validity and his use of the plaintiff's letters-patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention. *Hartell v. Tilghman*, 9 Otto, 547.

4. Relief in such a suit is founded on the contract, and not on those laws. *Ib.*

5. (Oct., 1845.) A bill in equity to enforce the specific performance of a contract to convey a patent is not a "case arising under the laws of the United States" as to patents, so as alone to give jurisdiction to its courts.

But an objection on that account, or on account of the residence of the parties, should be taken before the pleadings are closed. *Nesmith v. Calvert*, 1 Woodb. & M. 34.

6. (Oct., 1846.) The acts of Congress as to copyrights do not give any relief in this court which could not before be had, either in law or equity, in the state or United States court. *Pierpont v. Fowle*, 2 Woodb. & M. 23.

7. A bill in chancery, asking a disclosure and an account of sales, under the disposal of a copyright alleged to belong to the complainant, and praying an injunction against further sales, gives, on its face, jurisdiction appropriate to chancery, and about which a remedy at law would not be so complete as accounting here and an injunction. Chancery cannot grant relief on the ground that a right exists which the party has failed to redress at law; but proper matters for the exercise of its jurisdiction must be set out and sustained. *Ib.*

8. In this case, the title to the copyright under a contract of sale was also in dispute; and it was *held* that this question might be settled under this bill, and the case proceed in chancery, rather

than send the parties to the law side of this court to settle the title. *Ib.*

9. (Sept., 1854.) This court has not jurisdiction to render a judgment in a patent cause against a defendant not a resident in the district, and on whom no personal service of the writ has been made, and who has not appeared in the action, though an attachment was made of his property. *Saddler v. Hudson*, 2 Curt. C. C. 6.

10. (Oct., 1865.) It is competent for the Circuit Court to entertain a bill of complaint founded on letters-patent of the United States, for an injunction, for an account, or for the repeal of an interfering patent for the same invention. *Ayling v. Hull*, 2 Cliff. 494.

11. (April, 1811.) A bill filed to restrain the infringement of a patent, where both parties were citizens of the same state, dismissed, and an injunction refused, Congress having confined the remedy for a breach of patent-rights to an action at law, and the judiciary acts not giving the court jurisdiction in equity, except in cases between citizens of different states. *Livingston v. Van Ingen*, 1 Paine, 45.

12. (Oct., 1849.) In actions arising under the patent laws, the jurisdiction of the Circuit Courts of the United States does not depend upon the citizenship of the parties, but upon the subject-matter. *Allen v. Blunt*, 1 Blatchf. 480.

13. The eleventh section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 79), does not make it necessary in such actions that either the defendant or the plaintiff should be an inhabitant of the state where the suit is brought. *Ib.*

14. It is sufficient to give jurisdiction in such cases that the writ is served personally upon the defendant, in the district in which the suit is brought. *Ib.*

15. (Oct., 1850.) In a suit founded on the copyright act, where both parties are residents of New York, and the plaintiff fails to make out a title to his copyright, the question whether the court will interfere to prevent the use of the title of the work, upon principles relating to the good-will of trades, cannot be entertained, as the court has no jurisdiction of such a question. *Jollie v. Jaques*, 1 Blatchf. 618.

16. Whether, in case of a valid copyright for a work, and a piracy of the title, the court would not have jurisdiction

to interfere and protect the copyright under the act, *quære. Ib.*

17. (Oct., 1853.) The seventeenth section of the Patent Act of July 4, 1836 (5 Stat. at Large, 124), confers jurisdiction in equity upon the Circuit Courts, irrespective of the right of the plaintiff to an injunction, or of his demand for one. *Nevins v. Johnson*, 3 Blatchf. 80.

18. Accordingly, where the plaintiff's patent had expired, and a bill in equity filed by him alleged an infringement of the patent, and prayed for a discovery and an account, but not for an injunction,—*Held*, on a demurrer to the bill, that this court had jurisdiction of the case. *Ib.*

19. (June, 1857.) Where a license was granted under a patent, with covenants that the licensee should pay certain tariffs, and keep correct accounts, and permit his books to be examined, but there was no express provision that, if the covenants were broken, the rights granted should revert to the licensor, and a bill was filed by the licensor against the licensee, praying for a decree that the covenants should be performed, and for an injunction to prevent the use of the patent, under the license, until the covenants should be performed, and the citizenship of the parties did not give to the court jurisdiction of the suit,—*Held*, that the subject-matter did not give the court jurisdiction; that the suit was not one to prevent the violation of any right of the licensor, secured by any law of the United States, within sec. 17 of the Patent Act of July 4, 1836 (5 Stat. at Large, 124), but was one to prevent the violation of the rights secured by the covenants; and that the court had no jurisdiction of the case. *Good-year v. Union India-Rubber Co.*, 4 Blatchf. 63.

20. (March, 1869.) This court has no authority to entertain a suit to declare a patent void, except in the cases provided for by the sixteenth section of the act of July 4, 1836 (5 Stat. at Large, 123), and the tenth section of the act of March 3, 1839 (*id.* 354). *Merserole v. Paper Collar Co.*, 6 Blatchf. 356.

21. Where a bill in equity was filed in this court to restrain the defendant from suing the plaintiff on a license under a patent to recover tariffs thereunder, and to have it decreed that the consideration for the license had failed, because the patent was void for want of novelty, and to have the license cancelled,—*Held*, that the rights of the defendant, by virtue of the license, arose

out of the license, and not out of or under the patent, or the law under which it was granted, so as to give to this court jurisdiction of such bill under the seventeenth section of the act of July 4, 1836. *Ib.*

22. A state court has jurisdiction to decree a license under a patent to be void, and the fact that, in the investigation, that court will be obliged to inquire collaterally into the novelty and validity of the patent as a consideration for the license, cannot deprive the state court of jurisdiction, or confer it on this court. *Ib.*

23. A direct suit to repeal a patent cannot be brought in a state court. *Ib.*

24. (March, 1870.) This court, as a court of equity, has a full concurrent jurisdiction with the Circuit Court, as a court of law, of all actions for the infringement of a patent. But whether, as a court of equity, it can or will award damages irrespective of the gains and profits accrued to the defendant from the infringement, or in addition to such gains and profits, *quære*. *Perry v. Corning*, 7 Blatchf. 195.

25. (Dec., 1870.) F., a corporation, held a license under a patent, from W., G., and S., three other corporations, which provided that if W., G., and S. should grant a license of a specified character under such patent, to any other party, at a less license fee than that reserved in the license to F., the license fee to F. should be correspondingly reduced. By the license, the right was reserved to the licensors of terminating the license at their option, on written notice to F., for the breach of any of the agreements on the part of F., one of them being the due payment of license fees. F. filed a bill in equity against S. alone, alleging that the licensors had granted a license of the specified character, under the patent, to D., another corporation, at a less license fee than that reserved in the license to F. (a copy of the license to D. being annexed to the bill), and had concealed the fact from F. for more than a year, so that F. had largely overpaid the license fees properly due from it at the reduced rate, and praying that S. be ordered to reduce the license fee reserved in the license to F. to such less license fee from the time of the license to D., and to pay to F. the sums overpaid, and that the licensors might not claim any other or further sums than at such less license fee, and that S. be enjoined from giving notice, during the pendency

of the suit, of the option to terminate the license to F., and from attempting to collect license fees from F. The bill stated that F. and G. were Massachusetts corporations, W. was a Connecticut corporation, and S. was a New York corporation. *Held*, that the bill did not show a case for the cognizance of a court of equity. *Florence Sewing Machine Co. v. Singer Manufacturing Co.*, 8 Blatchf. 113.

26. *Held*, also, that a decree could not be made between F. and S., without affecting the rights of W. and G., who were not made parties to the suit, and that S. could take such objection at the hearing, although it had not been taken by plea, demurrer, or answer. *Ib.*

27. (June, 1878.) B., a patentee, granted to S. the exclusive right to make and vend the invention during the life of the patent, for a royalty. S. sued B. in equity, alleging that he was infringing the patent. *Held*, that, whether S. was a licensee or a grantee, he was suing B. on an infringement, and that the court had jurisdiction of the suit. *Stanley Rule & Level Co. v. Bailey*, 14 Blatchf. 510.

28. (May, 1879.) Although a suit in equity for the infringement of a patent is brought after the patent has expired, and no injunction can be granted, and the bill is not a bill of discovery, the court has jurisdiction to award an account of profits, and can take cognizance of the suit. *Gordon v. Anthony*, 16 Blatchf. 234.

29. (Nov., 1879.) The parties to the suit being all of them citizens of New York, this court has no power to decree that the defendant execute to the plaintiff a transfer of letters-patent. *Perry v. Littlefield*, 17 Blatchf. 273.

30. (May, 1880.) This suit was brought by the plaintiff against the postmaster. On a suggestion by the latter, one E. was made a defendant, as owning an interest in the patent, and afterwards others were made defendants as having an interest in it. *Held*, that the questions as to such interest were questions arising under the patent law, and within the jurisdiction of the court, whether the conveyances were made *pendente lite* or not. *Campbell v. James*, 18 Blatchf. 92.

31. (April, 1879.) The complainant and defendant being citizens of different states, the jurisdiction of the court is as a court of equity. It is doubted whether the United States Circuit

Court has jurisdiction in patent cases, except by injunction, where the parties are citizens of the same state. *Sayles v. Richmond, Fredericksburg, &c. Railroad Co.*, 3 Hughes, 172.

32. In this case it is sought to recover in equity, profits resulting to the defendant from using, through a series of years, a mechanical invention, without the owner's consent or authority. These profits do not consist in specific sums of money received by the defendant in so using the invention. They simply consist in the advantage and convenience derived from using them. This advantage is a matter of estimation as due in the lump. It is not a matter of accounts, and therefore a bill cannot be sustained for an account. Where there is an adequate common-law remedy, equity cannot take jurisdiction of a bill for profits arising from the use of a patent, solely on the ground of constructive trusteeship. *Ib.*

33. (April, 1872.) The right to the patent, and the infringement, may be set up and adjudicated in a court of equity, without a prior trial at law. *Farmer v. Calvert Lithographing, &c. Co.*, 1 Flipp. 228.

34. (April, 1845.) The Circuit Court of the United States has no jurisdiction to enforce the specific execution of a contract for the use of a patent-right, where the parties live in the state where suit is brought; but they may, by injunction, protect the right of the patentee or his assignee from infringement. *Brooks & Morris v. Stolley*, 3 McLean, 523.

35. Jurisdiction being acquired on the ground of infringement, the court may settle other matters between the parties in the case, which do not afford original ground of jurisdiction. *Ib.*

36. (1879.) Suits by patentee of an invention, against an infringer, to compel the latter to account for profits, when otherwise maintainable, are of equitable cognizance, although no injunction has issued, or can issue, and although brought after the expiration of the original or extended term of the patent. *Stevens v. Railway Co.*, 5 Dill. 486.

37. (1878.) Equity has jurisdiction of a bill, by a patentee against an infringer, which seeks a discovery and account of profits. (See *Stevens v. Kansas Pacific Railway Co.*, ante, 486.) *Sayles v. Railroad Co.*, 5 Dill. 561.

Jurisdiction. Suits by or against National Banks.

1. (Dec., 1869.) Suits may be brought under the fifty-seventh section of the act [National Bank Act of June 3, 1864 (13 Stat. at Large, 116),], *by* any association, as well as *against* it, though the word “by” be omitted in the text of the section. Reading the section by the light of another section of a prior act, on the same general subject, the omission is to be regarded as an accidental one. *Kennedy v. Gibson*, 8 Wall. 498.

2. (Oct., 1880.) The Circuit Court has jurisdiction of suits by or against a national bank, without regard to the citizenship of the parties. *County of Wilson v. National Bank*, 13 Otto, 770.

3. (Jan., 1871.) A banking corporation, incorporated under the act of June 3, 1864 (13 Stat. at Large, 101), and “located,” under the provisions of that act, at Chicago, Illinois, can sue, in this court, a defendant who is a citizen of New York. *National Bank v. Baack*, 8 Blatchf. 137.

4. (April, 1821.) The plaintiffs are a corporation established by law of the United States. The defendants are a corporation established by an act of the legislature of Pennsylvania. This is a case arising under an act of Congress which incorporated the Bank of the United States; and the suit may be maintained in this court. *Bank of United States v. Northumberland, &c. Bank*, 4 Wash. 108.

5. (Nov., 1876.) The act of Congress of Feb. 18, 1875 (18 Stat. 320), which is incorporated in sec. 5198, Revised Statutes,¹ does not confer exclusive jurisdiction upon the courts of the United States to try the actions therein referred to. *National Bank v. Adams*, 3 Woods, 21.

6. (Aug., 1871.) Under the fifty-seventh section of the National Currency Act of June 2, 1864, suits may be maintained *by*, as well as *against*, national banks, in the United States courts of the district of their location. *Union National Bank v. City of Chicago*, 3 Biss. 82.

7. (1873.) National banks may, by reason of their character as such, sue in the federal courts. *First National Bank of Omaha v. Douglas County*, 3 Dill. 298.

8. (April, 1880.) A federal court will assume equitable jurisdiction of a suit by a receiver of a bank against the estate of a

¹ Taking unlawful interest by national banks.

decendent for the recovery of a debt alleged to have been fraudulently concealed, although the claim is barred by the statute of limitations of the state in which such court has territorial jurisdiction. *Johnston v. Roe*, 1 McCrary, 162.

9. (Jan., 1880.) The federal courts have jurisdiction over all suits by and against national banks, irrespective of the subject-matter. *Foss v. First National Bank*, 1 McCrary, 474.

10. Joining merely nominal or formal parties has no effect either to confer or exclude the jurisdiction; but trustees, executors, and the like are not formal parties within the meaning of the rule, where, in fact, interested in the litigation. Accordingly, where two or three persons, claiming a certain fund which was in the custody of a national bank, brought their bill in equity against the bank and a third claimant, and the bank exhibited its cross-bill praying that the parties might interplead, this was held to confer jurisdiction, although but for such cross-bill the jurisdiction was doubted. *Ib.*

Jurisdiction. Suits to enjoin the Comptroller of the Currency.

1. (June, 1870.) This court has no jurisdiction to entertain a suit in equity, brought by a private person, to interfere with or control the administration of the duties of the Comptroller of the Currency, and of the Treasurer of the United States, in respect to bonds deposited with the treasurer to secure the redemption of the circulating notes of a national bank, under the act of June 3, 1864 (13 Stat. at Large, 99). *Van Antwerp v. Hulburd*, 7 Blatchf. 426.

2. No such jurisdiction is conferred by that act. *Ib.*

3. The provisions of the fifty-sixth and fifty-seventh sections of that act explained. *Ib.*

4. (March, 1871.) V., a citizen of New York, claimed title, by assignment from a national bank, to the United States bonds deposited by it with the Treasurer of the United States, as security for the redemption of its circulating notes, under the General Banking Act of June 3, 1864 (13 Stat. at Large, 99), and the acts amendatory thereof. He filed a bill in this court, setting forth that the Treasurer of the United States and the Comptroller of the Currency refused to recognize his rights in the bonds, or their proceeds, and that the said comptroller had ap-

pointed one K., a citizen of New York, receiver of the bank, and intended to sell the bonds and pay the surplus of their proceeds, after redeeming the circulating notes of the bank, to the general creditors of the bank, or to K., as such receiver, and that K. claimed, as such receiver, an interest adverse to the plaintiff in such bonds. The bill made the treasurer, and the comptroller, and K., defendants, and prayed for a decree establishing the plaintiff's title, and requiring the treasurer and the comptroller to deliver to the plaintiff the surplus of the bonds after redeeming the circulating notes of the bank, and decreeing the appointment of K. as receiver to be null and void. K. interposed a general demurrer to the bill for want of equity, — *Held*, that the demurrer must be allowed. *Van Antwerp v. Hulburd*, 8 Blatchf. 282.

5. *Held* (*per* WOODRUFF, J.): (1.) That the plaintiff could not question the validity of the appointment of K. in respect to other property than the bonds.

(2.) That, as the court could not grant the relief asked in respect to the treasurer and the comptroller, it could not, on the facts in the bill, grant the relief asked as against K.

(3.) That the proceeds of the bonds could not, under the act, ever come into the possession of K., and, therefore, K. had no concern in the subject-matter of the suit.

(4.) That the averment in the bill, that the complainant was informed and believed that K., as receiver, claimed an interest adverse to the plaintiff in the bonds, was not sufficient to sustain the bill as against the demurrer. *Id.*

6. *Held* (*per* HALL, J.): (1.) That the residuary interest of the bank in the bonds was a part of the assets of the bank, to which K., as receiver, was, under the act, entitled, if the plaintiff had no title to such residuary interest, and that, therefore, the bill showed a question of property between the plaintiff and K., as receiver, in respect to such residuary interest.

(2.) That the demurrer should be overruled, if the court had jurisdiction of the suit, as between the plaintiff and K.

(3.) That, as the plaintiff and K. were alleged to be citizens of the same state, this court had no jurisdiction of the suit. *Id.*

Jurisdiction. Suits to recover Offices.

1. (April, 1877.) The jurisdiction of the United States Circuit Courts, under sec. 2010, Revised Statutes, is limited to those actions in which the sole question touching the title to office arises out of the denial to citizens of the right to vote on account of their race, color, or previous condition of servitude. *Johnson v. Jumel*, 3 Woods, 69.

2. The section gives no jurisdiction over a case brought to enable a party physically to regain an office to which he had a title established by the election into which he had been inducted; but from which he had subsequently been ejected. *Id.*

Jurisdiction. Suits to redress Deprivation of Rights secured by the Constitution and Laws to Persons within Jurisdiction of United States.

ACT OF MARCH 1, 1875.

An Act to protect all Citizens in their Civil and Legal Rights.

SEC. 3. That the District and Circuit Courts of the United States shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses against, and violations of, the provisions of this act; and actions for the penalty given by the preceding section may be prosecuted in the Territorial, District, or Circuit Courts of the United States wherever the defendant may be found, without regard to the other party. [*Supplement to Rev. Stat.*, page 148.]

1. (Dec., 1871.) Under the act of 9th April, 1866 (14 Stat. at Large, 27), sometimes called "The Civil Rights Bill," which gives jurisdiction to the Circuit Court of all causes, civil and criminal, *affecting* persons who are denied, or cannot enforce, in the courts of the state or locality where they may be, any of the rights given by the act (among which is the right to give evidence, and to have full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens), a criminal prosecution is not to be considered as "affecting" mere witnesses in the case, nor any person not in existence. *United States v. Ortega* (6 Wheat. 467) affirmed. *Blyew v. United States*, 13 Wall. 581.

2. (Nov., 1878.) The federal courts have no jurisdiction, irrespective of the citizenship of the parties, of suits respecting violations of a state law or constitution by the officers of a state, which do not impair rights granted or secured by the Constitution or laws of the United States.¹ *Bertonneau v. Directors of City Schools*, 3 Woods, 177.

Jurisdiction. Crimes and Offenses.

1. (April, 1793.) The defendant, a consul from Genoa, was indicted for a misdemeanor, in sending anonymous and threatening letters to Mr. Hammond, the British Minister, Mr. Holland, a citizen of Philadelphia, and several other persons, with a view to extort money.

Before the defendant pleaded, his counsel (Heatly, Lewis, and Dallas) moved to quash the indictment, contending that to the Supreme Court of the United States belonged the exclusive cognizance of the case, on account of the defendant's official character.

WILSON, Justice. I am of opinion, that although the Constitution vests in the Supreme Court *an original* jurisdiction, in cases like the present, it does not preclude the legislature from exercising the power of vesting *a concurrent* jurisdiction in such inferior courts as might by law be established. And as the legislature has expressly declared that the Circuit Court shall have "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States," I think the indictment ought to be sustained.

PETERS, Justice. As I agree in the opinion expressed by Judge Wilson, for the reasons which he has assigned, it is unnecessary to enter into any detail.

IREDELL, Justice, dissented. *United States v. Ravara*, 2 Dall. 297.

2. (Feb., 1795.) But even if a special court were to be appointed to be held at a distant period, overleaping the stated Circuit Court, could an indictment found at the latter be prosecuted and tried at the former? There is a provision "that all business depending for trial at any special court shall, at the

¹ See Revised Statutes, sec. 1979. Bill in equity to compel school board of New Orleans to admit colored children in the same schools with white children.

close thereof, be considered as of course removed to the next stated term of the Circuit Court " (Swift's Edit. vol. ii. s. 3, p. 227), but there is no power given to remit to a special court the business depending for trial before the stated Circuit Court. *United States v. Hamilton*, 3 Dall. 17, 18.

3. And suppose a special Circuit Court were to be appointed previously to the stated court, could both be in session at the same time? Or, could two grand juries be impanelled at the same time, for the same district, and both be qualified to present all the offenses (including, of course, the offenses of treason) committed within their jurisdiction? *Ib.*

4. (April, 1798.) Whether the federal courts have jurisdiction in cases of indictment for crimes and offenses, at the common law, *quære*. *United States v. Worrall*, 2 Dall. 384-396.

5. The writing and delivering a letter at the post-office in Pennsylvania, though the party to whom it is directed receives it in New Jersey, is sufficient to give jurisdiction to the Circuit Court for the District of Pennsylvania, in the case of an indictment founded on the letter. *Ib.*

6. (April, 1799.) We think that the twelfth section of the Judiciary Act ought to be so construed as to vest in the judges a power of holding a special court in the proper county, if in other respects they do not deem it greatly inconvenient. The act of Congress passed the 2d of March, 1793 (2 Vol., p. 226, 3, Swift's Edit.), empowers the judges to "direct a special session of the Circuit Court to be holden for the trial of criminal cases, at any convenient place within the district *nearer* to the place where the offenses may be said to be committed than the place or places appointed by law for the ordinary sessions;" but this provision does not expressly discriminate between cases of a capital and of an inferior nature; and a provision having been previously made for capital cases, it would be justifiable to apply this to inferior cases. At all events, any criticism upon the word *nearer* (considering the whole state as a district, or county, in relation to the United States) would not prevent our appointing a special court in the proper county, if such an appointment was otherwise eligible. *United States v. The Insurgents of Pennsylvania*, 3 Dall. 513.

7. (Oct., 1806.) To constitute the crime of murder on the high seas, the mortal stroke must be given and the death happen

on the high seas. The defendant had given a mortal stroke to one in the haven of Cape François, but the deceased did not die until his removal on shore. *Held*, that the offense was not cognizable under the eighth section of the act of Congress of April 30, 1790 (1 Story's Laws U. S. 84). *United States v. M' Gill*, 4 Dall. 395.

8. (Feb., 1812.) The courts of the United States have no common-law jurisdiction in cases of libel against the government of the United States. But they have the power to fine for contempts, to imprison for contumacy, and to enforce the observance of their orders. *United States v. Hudson & Goodwin*, 7 Cranch, 32.

9. (Feb., 1816.) *Quære*: Whether the courts of the United States have jurisdiction of offenses at common law, against the United States. *United States v. Coolidge*, 1 Wheat. 415.

10. Case of *United States v. Hudson & Goodwin*, 7 Cranch, 32, cited and followed; as the members of the court differed in opinion, in the present case.

11. (Feb., 1818.) Admitting that the third article of the Constitution of the United States, which declares "that the judicial power shall extend to all cases of admiralty and maritime jurisdiction," vests in the United States exclusive jurisdiction of all such cases, and that a murder committed in the waters of a state, where the tide ebbs and flows, is a case of admiralty and maritime jurisdiction; Congress have not, in the eighth section of the act of 1790, ch. 9, "for the punishment of certain offenses against the United States," so exercised this power as to confer on the courts of the United States jurisdiction over such murder. *United States v. Bevens*, 3 Wheat. 336.

12. *Quære*: Whether courts of common law have concurrent jurisdiction with the admiralty, over murder committed in bays, &c., which are enclosed parts of the sea. *Ib.*

13. Congress having, in the eighth section of the act of 1790, ch. 9, provided for the punishment of murder, &c., committed "upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state," it is not the offense committed, but the *bay*, &c., in which it is committed, that must be out of the jurisdiction of the state. *Ib.*

14. The grant to the United States, in the Constitution, of all cases of admiralty and maritime jurisdiction, does not extend to

a cession of the waters in which those cases may arise, or of general jurisdiction over the same. Congress may pass all laws which are necessary for giving the most complete effect to the exercise of the admiralty and maritime jurisdiction granted to the government of the Union. But the general jurisdiction over the place, subject to this grant, adheres to the territory, as a portion of territory not yet given away ; and the residuary powers of legislation still remain in the state. *Id.*

15. Congress have power to provide for the punishment of offenses committed by persons serving on board a ship of war of the United States, wherever that ship may lie. But Congress have not exercised that power in the case of a ship lying in the waters of the United States ; the words, “ within any fort, arsenal, dock-yard, magazine, or in *any other place* or district of country *under the sole and exclusive jurisdiction of the United States,*” in the third section of the act of 1790, ch. 9, not extending to a ship of war, but only to objects in their nature fixed and territorial. *Id.*

16. (Feb., 1818.) A robbery committed on the high seas, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, is *piracy*, under the eighth section of the act of 1790, ch. 36 (ix), for the punishment of certain crimes against the United States ; and the Circuit Courts have jurisdiction thereof. *United States v. Palmer*, 3 Wheat. 610.

17. (Feb., 1826.) An indictment under the Crimes Act of 1790, ch. 36, for infracting the law of nations by offering violence to the person of a foreign minister, is not a case “ affecting ambassadors, other public ministers and consuls,” within the second section of the third article of the Constitution of the United States. *United States v. Ortega*, 11 Wheat. 467.

18. The Circuit Courts have jurisdiction of such an offense, under the eleventh section of the Judiciary Act of 1789, ch. 20. *Id.*

19. *Quære* : Whether the jurisdiction of the Supreme Court is not only original, but exclusive of the Circuit Court, in “ cases affecting ambassadors, other public ministers and consuls,” within the true construction of the second section of the third article of the Constitution. *Id.*

20. (Jan., 1838.) Indictment in the Circuit Court of the

United States for the Southern District of New York, for feloniously stealing a quantity of merchandise belonging to the ship "Bristol," the ship being in distress and cast away on a shoal of the sea on the coast of the state of New York. The indictment was founded on the ninth section of the act, entitled "An Act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes, approved 3d March, 1825." The goods were taken above high-water mark, upon the beach, in the county of Queens, in the State of New York. *Held*, that the offense committed was within the jurisdiction of the Circuit Court. *United States v. Coombs*, 12 Pet. 72.

21. (Dec., 1853.) In June, 1844, Congress passed an act, by virtue of which the Circuit Court of the United States for the District of Arkansas was vested with power to try offenses committed within the Indian country.

In July, 1844, it was alleged that a murder was committed in that country.

In April, 1845, an indictment was found by a grand jury, in the Circuit Court of the United States for the District of Arkansas, against a person charged with committing the murder.

In March, 1851, Congress passed an act erecting nine of the western counties and the Indian country into a new judicial district, directing the judge to hold two terms there, and giving him jurisdiction of all causes, civil or criminal, except appeals and writs of error, which are cognizable before a Circuit Court of the United States.

The residue of the state remained a judicial district, to be styled the Eastern District of Arkansas.

This act of Congress did not take away the power and jurisdiction of the Circuit Court of the United States for the Eastern District, to try the indictment pending. *United States v. Dawson & Baylor*, 15 How. 467.

22. (Dec., 1861.) To give a Circuit Court of the United States jurisdiction of an offense not committed within its district, it must appear, not only that the accused party was first apprehended in that district, but also that the offense was committed out of the jurisdiction of any state, and not within any other district of the United States. *United States v. Jackalow*, 1 Black, 484.

23. (Dec., 1865.) The twelfth section of the Judiciary Act of 1789, which gives to the Circuit Courts concurrent jurisdiction of all crimes and offenses cognizable in the District Courts, is prospective, and embraces all offenses the jurisdiction of which is vested in the District Courts by subsequent statutes. *United States v. Holliday*, 3 Wall. 407.

24. Therefore the Circuit Courts have jurisdiction of the offense of selling ardent spirits to an Indian, under the act of Feb. 12, 1862; although by that act the jurisdiction is vested only in the District Court. *Ib.*

25. (Oct., 1873.) Under the act of March 3, 1825, s. 22, by which an assault on a person upon the high seas with a dangerous weapon is made an offense against the United States, and the trial of the offense is to be "in the district where the offender is apprehended, OR into which he may first be brought," a person is triable in the Southern District of New York, who, on a vessel owned by citizens of the United States, has committed on the high seas the offense specified; has been then put in irons for safe keeping; has, on the arrival of the vessel at anchorage at the lower quarantine, in the Eastern District of New York, been delivered to officers of the State of New York, in order that he may be forthcoming, &c.; and has been by them carried into the Southern District, and there delivered to the marshal of the United States for that district, to whom a warrant to apprehend and bring him to justice was first issued. *United States v. Arwo*, 19 Wall. 486.

26. (Oct., 1879.) The Circuit Courts have jurisdiction of indictments under these laws [secs. 2011, 2012, 2016, 2017, 2021, 2022, 5515, and 5522, of the Revised Statutes], and a sentence in pursuance of a verdict of condemnation is lawful cause of imprisonment. *Ex parte Siebold*, 10 Otto, 372.

27. (Oct., 1879.) An officer of election, at an election for a representative to Congress, in the city of Cincinnati, was convicted of a misdemeanor in the Circuit Court of the United States, under sec. 5515 of the Revised Statutes, for a violation of the law of Ohio, in not conveying the ballot-box, after it had been sealed up and delivered to him for that purpose, to the county clerk, and for allowing it to be broken open. *Held*, according to the decision in *Ex parte Siebold* (*supra*, p. 371), that Congress had power to pass the law under which the conviction was had,

and that the Circuit Court had jurisdiction of the offense. *Ex parte Clarke*, 10 Otto, 399.

28. (May, 1812.) The exportation of goods to a foreign country, contrary to the act of Jan. 9, 1809, ch. 72, s. 1, is a misdemeanor, of which the Circuit Court has original cognizance; and it seems the prosecution may well be by information. *United States v. Mann*, 1 Gall. 2.

29. (Oct., 1812.) The Circuit Court of the United States has jurisdiction over such an offense. [An offense punishable by fine and imprisonment under the Embargo Act of Jan. 9, 1809, ch. 72.] *United States v. Mann*, 1 Gall. 176.

30. (Oct., 1813.) *Quere*: Whether the Circuit Court of the United States has jurisdiction over common-law offenses against the United States. *United States v. Coolidge*, 1 Gall. 488.

31. (Nov., 1819.) *Held*, that the right of exclusive legislation carries with it the right of exclusive jurisdiction; and where a murder is committed within a fort so purchased [by the United States], with the consent of a state legislature, the Circuit Court has jurisdiction over the offense, under the act of 1790, ch. 9, secs. 3 and 7, although in the session the state reserved a right to execute the civil and criminal processes issuing under state authority in such places. *United States v. Cornell*, 2 Mason, 60.

32. (May, 1822.) Forgeries, under the laws of the United States, must be tried in the district where the crime is committed. *United States v. Britton*, 2 Mason, 464.

33. (May, 1829.) The words "high seas," in the crimes statute of 1825, ch. 276, s. 22, mean the unenclosed waters of the ocean, on the sea-coast, outside of the *fauces terræ*. *United States v. Grush*, 5 Mason, 290.

34. The state courts have jurisdiction of offenses committed on arms of the sea, creeks, havens, basins, and bays, within the ebb and flow of the tide, when those places are within the body of a county; and in such cases the Circuit Courts of the United States have no jurisdiction under the said statute [Crimes Statute of 1825, ch. 276, s. 22]. *Id.*

35. (Oct., 1829.) The offense of larceny is not punishable under the act of 1790, ch. 9 [36], unless committed in a place under the sole and exclusive jurisdiction of the United States; and to bring the case within the statute, there must be an aver-

ment of such sole and exclusive jurisdiction in the indictment. *United States v. Davis*, 5 Mason, 356.

36. Where a larceny is committed in a place not under the sole and exclusive jurisdiction of the United States, it may yet be punishable under the third section of the act of 1825, ch. 276. *Ib.*

37. Offenses are punishable under that section, according to the state laws, where they are committed, under circumstances or in places in which, before that act, no court of the United States had authority to punish them. *Ib.*

38. It seems that a reservation on a cession of "concurrent jurisdiction," to serve state process, civil and criminal, in the ceded place, does not exclude the exclusive legislation or exclusive jurisdiction of the United States over the ceded place. It merely operates as a condition of the grant. *Ib.*

39. (May, 1832.) The jurisdiction to try the offense [attempt to commit a revolt, contrary to Crimes Act of 1790, ch. 9, s. 12] attaches under the eighth section of the act of 1790, ch. 36, to the district into which the offender is first brought, or in which he is apprehended, in the alternative; so that the trial may be in either district. *United States v. Thompson*, 1 Sumn. 168.

40. (May, 1837.) A gun was fired from an American ship lying in the harbor of Raiatea, one of the Society Isles, and a foreign government, by which a person on board a schooner belonging to the natives, and lying in the harbor, was killed. *Held*, that the act was, in contemplation of law, done on board the foreign schooner where the shot took effect; and that jurisdiction of it belonged to the foreign government, and not to the courts of the United States, under the Crimes Act of 1790, ch. 36 s. 12. *United States v. Davis*, 2 Sumn. 482.

41. *Quære*, if the waters of the harbor of the island of Raiatea are to be deemed the high seas. *Ib.*

42. (Oct., 1845.) Where the United States own land situated within the limits of particular states, and over which they have no cession of jurisdiction, for objects either special or general, the rights and remedies in relation to it are usually such as apply to other land-owners within the state, and the *lex rei sitæ* will govern; except where the Constitution, treaties, or statutes of the United States otherwise require and provide. *United States v. Ames*, 1 Woodb. & M. 76.

43. The territory belonging to the United States, not situated within the limits of any state, and also that within such limits, but over which jurisdiction has been ceded to the United States, and which is used for exclusive and constitutional objects, are subject to the laws of Congress, and not to those of the state, when conflicting in any degree with what has been required by the general government. *Ib.*

44. The United States, in cases where Congress has not provided any or adequate remedies for injuries to public property, may resort to those of common-law origin, or those provided by the laws of the several states. *Ib.*

45. But in a place over which jurisdiction has been ceded to the United States, the state laws cannot be permitted to thwart or embarrass the object of the cession. *Ib.*

46. (Oct., 1846.) In an indictment against a corporation for obstructing the navigation of a river, but which had been authorized by a state law, the construction as to its acts must be liberal in its favor. Nothing can be deemed an offense by such a corporation in the courts of the United States, except what has been made so by the Constitution, or a treaty, or an act of Congress. These courts being of limited jurisdiction, under a government of limited powers, a case must be clearly within its jurisdiction or it will be dismissed, whenever and however the objection is made. *United States v. New Bedford Bridge*, 1 Woodb. & M. 401.

47. The act of 1789, ch. 20, as to the powers of the Circuit Courts, neither makes such act a crime, nor confers on this court authority to punish the erection of a bridge over tide-water, or the obstruction of navigation in navigable waters. *Semble*, it might have done the last, if it had been declared to be a crime. Nor do the treaties with foreign powers, allowing ingress and egress to our ports for trade, do either; nor the acts of Congress creating the port, where the obstruction is, a port of entry, or making a collection of duties there, or giving coasting licenses, or punishing breaches of the revenue laws. *Ib.*

48. (March, 1856.) The civil jurisdiction of the courts of the United States, in maritime causes of contract or tort, embraces tide-waters within the bays, inlets of the sea, and harbors along the sea-coast of the country, and in navigable rivers. *United States v. Wilson*, 3 Blatchf. 435.

49. But the federal courts of inferior jurisdiction cannot take cognizance of criminal offenses of any grade, without the express appointment or direction of positive law. *Ib.*

50. Under sec. 1 of the act of March 26, 1804 (2 Stat. at Large, 290), prescribing punishment for the offense of wilfully destroying a vessel, it is necessary, in order to give to this court jurisdiction of the offense, that it should have been committed upon the high seas, and not merely upon waters within the jurisdiction of the United States. *Ib.*

51. Congress, in its criminal legislation, uses the term *high seas* in its popular and natural sense, and in contradistinction to mere tide-waters flowing in ports, havens, and basins, that are land-locked in their position, and subject to territorial jurisdiction. *Ib.*

52. (March, 1860.) A vessel lying in a harbor, fastened to the shore by cables, and communicating with the land by her boats, and not within any enclosed dock, or at any pier or wharf, is, within the common acceptance of the term, on the "high seas," outside of low-water mark on the coast. *United States v. Seagrist*, 4 Blatchf. 420.

53. The act of March 3, 1825 (4 Stat. at Large, 115, s. 5), giving directly to the courts of the United States jurisdiction over certain classes of offenses committed on board of American vessels in foreign ports, was not designed to abrogate or curtail the jurisdiction of the United States over crimes committed at sea, but to remove doubts whether that jurisdiction could be exercised when the *locus in quo* was a locked harbor, adapted by nature or artificially to protect vessels from the perils of an open coastage. *Ib.*

54. (Jan., 1861.) The extent of the jurisdiction of this court in regard to the offenses of treason and misprision of treason, defined. [Charge to grand jury.] *The Law of Treason*, 4 Blatchf. 518.

55. (Oct., 1861.) The third section of the act of May 15, 1820 (3 Stat. at Large, 600), in regard to robbery on the high seas, applies to all persons, whether citizens or foreigners. *United States v. Baker*, 5 Blatchf. 6.

56. The ninth section of the act of April 30, 1790 (1 Stat. at Large, 114), in regard to piracy or robbery on the high seas, applies only to citizens and not to foreigners. *Ib.*

57. *Semble*, that, under the fourteenth section of the act of

March 3, 1825 (4 Stat. at Large, 118), which provides that the trial of all offenses which shall be committed upon the high seas, or elsewhere, out of the limits of any state or district, shall be in the district where the offender is apprehended, or into which he may be first brought, an offender captured on the high seas by a public armed vessel of the United States, and ordered to New York for trial, and put on board of a vessel destined for Hampton Roads, and taken to Hampton Roads, and there transferred to another vessel, by which he is taken to New York, where he is arrested for the offense, is not to be regarded as having been brought into the district in which Hampton Roads is situated. *Ib.*

58. The provision of the fourteenth section is in the alternative, and under it an offender may be tried either in the district into which he is first brought, or in the district in which he is apprehended under lawful authority for trial for the offense. *Ib.*

59. (Nov., 1861.) An offense commenced to be committed on board of an American vessel lying at the time in a river which is an arm of the sea on the coast of Africa, and continued uninterruptedly to a point in the Atlantic Ocean several miles from land, is within the jurisdiction of the United States and of a Circuit Court thereof. *United States v. Gordon*, 5 Blatchf. 18.

60. (Dec., 1865.) The Circuit Court of the United States for the Eastern District of New York has, by virtue of the act of March 3, 1825 (4 Stat. at Large, 115), jurisdiction of an indictment for an assault with intent to kill, committed in the navy-yard at Brooklyn. *United States v. Donlan*, 5 Blatchf. 284.

61. (March, 1876.) L., to an indictment for forgery, pleaded want of jurisdiction in the court, setting up that he was arrested in Ireland upon a requisition made by the United States, and was charged with the crimes of forging and uttering a bond and affidavit; that, in pursuance of the British Extradition Act of Aug. 9, 1870 (33 & 34 Vict. ch. 52), by arrangement between the United States and Great Britain, it was agreed, in respect to his surrender, that he should not, until he had been restored, or had an opportunity of returning to the British dominions, be detained or tried within the United States for any offense committed prior to his surrender, other than the extradition crimes of forging and uttering said bond and affidavit; that, on the faith of said agreement, he was conveyed within the United States under an extradition warrant which recited that he was

accused of said crimes ; that he is subject to be tried for said crimes, and for none other ; that the President had directed the district attorney to proceed against him on no charges except those on which he was extradited ; that the offenses in the indictment are not those on which his surrender was grounded, and not those specified in the said warrant ; that he has been held in custody for the crimes specified in said warrant, but was not tried for either of them ; and that the court has no jurisdiction to try the indictment until a reasonable time shall have elapsed after his trial for crimes specified in said warrant, that he may have an opportunity to return to the British dominions. To this plea there was a replication ; to the replication there was a rejoinder ; and to the rejoinder there was a general demurrer. *Held*, —

(1.) In a criminal case, on a demurrer to a pleading, judgment is to be given against the party who has committed the first fault in pleading.

(2.) Extradition proceedings do not, by their nature, secure to the person surrendered immunity from prosecution for offenses other than the one upon which the surrender was made.

(3.) There is no provision in the treaty between the United States and Great Britain of Aug. 9, 1842 (8 Stat. at Large, 572), which confers such immunity ; nor is it conferred by the act of Aug. 12, 1848 (9 Stat. at Large, 302), or by the act of March 3, 1869 (15 id. 337).

(4.) The British Extradition Act of Aug. 9, 1870 (33 & 34 Vict. ch. 52), has no binding force on the courts of the United States in regard to the construction of the treaty of 1842.

(5.) It does not appear that the Executive Department of either the United States or Great Britain has construed the treaty of 1842 as conferring such immunity.

(6.) No order of the President can have any legal effect to restrict or enlarge the jurisdiction conferred by law on the courts.

(7.) The agreement set up in the plea is of no avail as an objection to the jurisdiction of the court. *United States v. Lawrence*, 13 Blatchf. 295.

62. (Oct., 1806.) Indictment for murder. The first count laid the stroke and the death on the high seas ; the second laid it in the haven of Cape François ; the third laid the stroke in the haven of Cape François, and the death on the land in Cape François. The only count proved was the last.

The law of the United States declares that murder committed on the high seas shall be tried in the district where the offender is apprehended, or into which he is first brought ; and therefore the Circuit Court has jurisdiction over this case, arising under the authority of the United States. *United States v. Magill*, 1 Wash. 463.

63. To constitute the offense of murder, under the law of the United States, cognizable in the Circuit Court of the United States, not only the *stroke*, but the *death* must happen on the high seas. *Ib.*

64. (Oct., 1811.) Indictment against the defendants, part of the crew of the vessel. First count, for confining the master ; and the second count, for endeavoring to make a revolt in the ship : both charged to have been committed on the high seas.

The offenses charged against the defendants were committed while the vessel was lying in the river, about one and a half miles below St. Ubes, and within the bar, the river being about one mile and a half wide at the mouth ; and the court were of opinion that they had jurisdiction of the case. *United States v. Smith*, 3 Wash. 78.

65. (Oct., 1819.) Indictment for manslaughter, committed by the master of an American merchant ship on a seaman in the river off Wampoa, in China.

Quære, Whether this offense, which was committed on a river, was within the jurisdiction of the Circuit Court of the United States, according to the provisions of the act of Congress. *United States v. Wiltberger*, 3 Wash. 515.

66. (Oct., 1829.) The defendant was indicted for robbery and piracy on the high seas, on board a brig called " L'Eclair," a foreign vessel, belonging exclusively to French owners, and sailing under the French flag. *Held*, that under the acts of Congress of the United States, this court has no jurisdiction to try and punish the offense. *United States v. Kessler*, Baldw. 15.

67. Whether the offense was committed within or without a marine league of the coast of the United States, is of no importance to the question of jurisdiction. *Ib.*

68. (Jan., 1877.) The courts of the United States have, by sec. 711 of the Revised Statutes of the United States, jurisdiction, exclusive of the state courts, of crimes committed in the Gosport navy-yard in Virginia. *Ex parte Tatem*, 1 Hughes, 588.

69. By "navy-yard" is meant not merely the land on which the government does work connected with ships of the navy, but the waters contiguous, necessary to float vessels of the navy while at the navy-yard. *Ib.*

70. (May, 1875.) Perjury committed in the course of a judicial investigation, conducted under authority of acts of Congress, is an offense against the public justice of the United States, and is exclusively cognizable in the courts of the United States. *Ex parte Dock Bridges*, 2 Woods, 428.

71. (Nov., 1878.) The jurisdiction of a court of the United States to try persons accused of conspiracy, under sec. 5520 of the Revised Statutes, is not ousted by the fact that the indictment charges that, in carrying out their design, the conspirators were guilty of a crime of which the state courts had exclusive jurisdiction, even though such crime were of higher grade than the conspiracy charged. *United States v. Goldman*, 3 Woods, 187.

72. (April, 1864.) Land rented to the United States, to be used temporarily as a camp, is not a *place*, within the terms of the Constitution of the United States, over which the United States have "sole and exclusive jurisdiction." *United States v. Tierney*, 1 Bond, 571.

73. Within such camp the jurisdiction of the United States would only be such as was necessary for military purposes, and required for the enforcement of discipline and the execution of the rules and articles of war. *Ib.*

74. The United States possesses exclusive jurisdiction of places that have been *purchased* by the United States *by consent* of the legislature of the state, for the purpose of erecting a port, magazine, arsenal, dock-yard, or other needful building. *Ib.*

75. The courts of the United States have no jurisdiction of an offense against sec. 16 of the act of Congress of 1790, committed in a place where the jurisdiction of the United States is concurrent with that of a state. *Ib.*

76. (Oct., 1834.) The act of 1817, which assumes to exercise a general jurisdiction over Indian countries within a state, is unconstitutional and of no effect. *United States v. Bailey*, 1 McLean, 234.

77. The crime of murder charged against a white man, for killing another white man in the Cherokee country within the State of Tennessee, cannot be punished in the courts of the United States. *Ib.*

78. (Oct., 1851.) The forgery of a land warrant not being embraced, either expressly or by fair implication, in any act of Congress, there is consequently no jurisdiction to punish; and a motion to quash an indictment for such forgery will be sustained. *United States v. Irwin*, 5 McLean, 179.¹

79. (May, 1863.) The act of June 30, 1834 (4 Stat. 729), confers upon the federal courts jurisdiction of offenses against the laws of the United States committed on Indian reservations in Kansas, unless subsequent legislation has withdrawn the locality from that jurisdiction. *United States v. Ward*, Woolw. 17.

80. The act admitting the state [of Kansas] into the Union withdraws all such territory from the federal jurisdiction, with an exception therein stated. *Ib.*

81. The exception mentioned in the act, of territory thus withdrawn from the federal jurisdiction, is territory of Indians having treaties with the United States, which provide that, without their consent, such territory shall not be subjected to state jurisdiction. *Ib.*

82. The *converse* is inferable, that Indian territory not protected by such treaty is brought within, and subjected to, state jurisdiction. *Ib.*

83. (May, 1868.) The United States, when it admitted Kansas into the Union, although retaining the title to the land which it then owned within the state, parted with the jurisdiction over it, so far as the general purposes of government are concerned, with certain reservations and exceptions.

These reservations and exceptions were: (1.) Lands of Indian tribes having treaties with the United States, which exempt them from state jurisdiction.

(2.) The right to tax lands of the United States, and of Indians. *United States v. Stahl*, Woolw. 192.

84. Forts of the United States might have been, but were not, excepted. *Ib.*

85. In respect of jurisdiction within forts, Kansas is on the same footing as the original states. Her consent is necessary to the exercise by the United States of jurisdiction within them. *Ib.*

86. Fort Harker was, in 1863, established as a military post on government land in Kansas, and the United States has always retained the fee. In 1861, Kansas was admitted into the Union

¹ But see subsequent acts of Congress.

on an equal footing with the original states, with boundaries which included the lands on which the fort was established. *Held*, that the fort is not within the jurisdiction of the federal courts to punish the crime of murder committed therein. *Ib*.

87. (1870.) Indians, though belonging to a tribe which maintains the tribal organization, but occupying a reservation *within* the limits of a state where there are no statute or treaty provisions granting or retaining jurisdiction in favor of the United States over offenses committed by them, are amenable to state laws for murder or other offenses against such laws when committed *off* the reservation, and within the limits of the state. *United States v. Yellow Sun*, 1 Dill. 271.

88. As to jurisdiction of United States courts over offenses, under such circumstances, committed by Indians *upon* reservations, *quære*. *Ib*.

89. The court, in a capital case against Indians, though neither party asked it, and both demanded judgment on a verdict of guilty, arrested the judgment *on its own motion* for want of jurisdiction in the court over the offense charged. *Ib*.

90. Under these circumstances, the court, after arresting the judgment, instead of at once discharging the defendants, made a special order for turning them over to the state authorities. *Ib*.

91. (1877.) The title to the land constituting the military reservation of Fort Leavenworth in Kansas has always been in the United States. In 1875, at the instance of the Secretary of War, the legislature of the state passed an act ceding exclusive jurisdiction to the United States over all territory included within the reservation. Congress never expressly assumed this jurisdiction. Subsequently a larceny was committed on the reservation. *Held*, that the jurisdiction over the offense was in the courts of the general government, and not in those of the State of Kansas. *Ex parte Hebard*, 4 Dill. 380.

92. (April, 1844.) The Circuit Court of this district [Arkansas], in the absence of any statute attaching the Indian country west of Arkansas thereto, has no jurisdiction over such Indian country, and cannot punish an offense committed therein. *United States v. Alberty*, Hempst. 445.

93. (April, 1845.) The twenty-fifth section of the act of June 30, 1834, extends the laws of the United States over the Indian country, with a proviso that they shall not include punish-

ment for "crimes committed by one Indian against the person or property of another Indian." *United States v. Rogers*, Hempst. 451.

94. This exception does not embrace the case of a white man, who, at mature age, is adopted into an Indian tribe. He is not an "Indian," within the meaning of the law. *Ib.*

95. The treaty with the Cherokees, concluded at New Echota in 1835, allows the Indian council to make laws for their own people, or such persons as have connected themselves with them. But it also provides that such laws shall not be inconsistent with acts of Congress. The act of 1834, therefore, controls and explains the treaty. *Ib.*

96. It results from these principles that a plea set up by a white man, alleging that he had been adopted by an Indian tribe, and was not subject to the jurisdiction of the Circuit Court of the United States, is not valid. [See 4 How. 567.] *Ib.*

97. (July, 1846.) Until the act of June 17, 1844 (4 Stat. 733), was passed by Congress, the courts of the United States had no jurisdiction to hear, try, and punish offenses committed in the Indian country west of Arkansas. *United States v. Starr*, Hempst. 469.

98. That act was prospective, and did not operate on the past. *Ib.*

99. (April, 1847.) The courts of the United States are only authorized to try and punish such crimes as Congress expressly, or by necessary implication, has designated and affixed known and certain penalties to, and such courts have no common-law jurisdiction in that respect. *United States v. Ramsay*, Hempst. 481.

100. (April, 1847.) The Circuit Court has no jurisdiction to punish offenses under the intercourse law of 1834 (9 L. U. S. 135), committed by one Indian against the person or property of another Indian. *United States v. Sanders*, Hempst. 483.

101. (Dec., 1847.) The Circuit Court of the United States [for the District of Arkansas] had no jurisdiction to punish offenses committed in the Indian country west of Arkansas, anterior to the 17th of June, 1844.

Cases of *United States v. Alberty* (*ante*, p. 444) and *United States v. Starr* (*ante*, p. 469) cited and confirmed. *United States v. Ivy*, Hempst. 562.

102. (April, 1853.) Persons indicted in 1845, in the Circuit Court of the United States for the District of Arkansas, for a

felony committed in the Indian country west of Arkansas, and which territory was transferred to the Western District of Arkansas by the act of March 3, 1851 (9 Stat. 594), are subject to be tried in the court where the indictment was found; and the court in the Western District has no jurisdiction. *United States v. Dawson & Baylor*, Hempst. 643.

103. The act did not deprive the court where an indictment was pending of the right to try and determine the same. *Ib.*

104. (Sept., 1864.) The criminal jurisdiction of the United States may, in some instances, extend to their citizens beyond their territory, as, for instance, for violation of treaty stipulations by them abroad; for offenses committed in foreign countries where jurisdiction is by treaty conceded for that purpose, as in some cases in China and the Barbary States; for offenses committed on deserted islands or uninhabited coasts by officers and seamen of vessels sailing under their flag; and for derelictions of duty by their ministers, consuls, and other representatives abroad. But except in cases like these (and their extra-territorial character is generally indicated in the law designating the act for which punishment is prescribed), the criminal jurisdiction of the United States is limited to their own territory, actual or constructive. Their actual territory is coextensive with their possessions, including a marine league from their shores on the sea. Their constructive territory embraces vessels sailing under their flag. Wherever they go, they carry the laws of their country, and for a violation of them their officers and seamen may be subjected to punishment. *United States v. Smiley*, 6 Sawyer, 640.

105. In this case the vessel which carried the money recovered by the accused was at the time of its recovery broken up, without a vestige of it remaining. The money was buried in the sand several feet under the water of the sea, and was within one hundred and fifty feet of the Mexican shore. *Held*, that there was no jurisdiction of the United States over the place or property, and that the jurisdiction of Mexico over all offenses committed within a marine league of its shores, not on a vessel of another nation, was complete and exclusive. *Ib.*

106. (Oct., 1866.) Although there are no offenses against the United States, except such as are declared by act of Congress, and the criminal jurisdiction of the Circuit Court is in this respect limited, yet it has jurisdiction to inquire into, and pass

upon, all acts charged by competent authority to be public offenses, and presented to it by such authority for its consideration. *United States v. Reese*, 4 Sawyer, 629.

Jurisdiction in Bankruptcy.

SEC. 630. The Circuit Courts shall have jurisdiction in matters in bankruptcy, to be exercised within the limits and in the manner provided by law.

2 March, 1867, c. 176, ss. 2, 8, v. 14, pp. 518, 520.

22 June, 1874, c. 401, s. 2, v. 18, p. 195.

Jurisdiction in Bankruptcy. Original Proceedings.

1. (Dec., 1857.) The Circuit Court of the United States has no power to entertain an original bill brought by a creditor, who has come in and proved his debt against the bankrupt for the purpose of annulling or vacating a discharge and certificate in bankruptcy obtained in the District Court upon imputations of fraud, done in contemplation of bankruptcy by the bankrupt, or to give relief either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, who had assented to the bankrupt's discharge and certificate, and who had taken a dividend out of the bankrupt's estate. *Commercial Bank v. Buckner*, 20 How. 108.

2. Whether or not such a bill could be filed by a creditor who had not come in and proved his debt, and who was not a party to the decree in bankruptcy, is a question which the court does not now decide. *Ib.*

3. Nor has the Circuit Court the power, under its general jurisdiction over frauds, to give relief, either at law or in equity, in a suit brought by a creditor who had proved his debt under the commission, had assented to the bankrupt's discharge and certificate, and had taken a dividend out of the bankrupt's estate. *Ib.*

4. (Dec., 1859.) The Parish Court of New Orleans had exclusive jurisdiction over property ceded by insolvents, and the courts of the United States have no jurisdiction over such insolvencies. *Adams v. Preston*, 22 How. 473.

5. An allegation of fraud in a bill filed to review such proceedings in insolvency, which was afterwards abandoned, is not

sufficient to give the Circuit Court jurisdiction to review the proceedings of the state court. *Ib.*

6. (Dec., 1872.) The Circuit Court may, under the second section of the Bankrupt Act, entertain, on bill as an original proceeding, a case thus involving a question of adverse interest in goods so seized. *Marshall v. Knox*, 16 Wall. 551.

7. In such a case, where the goods have been taken out of his [the lessor's] hands, and given to the assignee in bankruptcy, by an order of the District Court acting summarily and without jurisdiction, and sold by such assignee, the Circuit Court, having got possession of the case, by bill filed by the lessor, to be regarded as one in an original proceeding, will proceed and decide the whole controversy. *Ib.*

8. (Oct., 1873.) After an assignee in bankruptcy, aided by a creditor, has twice contested, before the District Court or its referee, the claim of a person who has been allowed to prove his claim, and, after all the evidence which could then or afterwards be produced, it has been twice decided that the claim was a valid one, no bill lies in the Circuit Court (either under the general provisions of the Bankrupt Act, or under the second section of it, giving to the Circuit Court a general superintendence and jurisdiction of all cases and questions arising under the act) against either the assignee, or the person who has been allowed to prove his claim, to have the order allowing it reversed. Such a bill may be demurred to for want of equity. *Bank v. Cooper*, 20 Wall. 171.

9. (Oct., 1875.) Under the Bankrupt Act of March 2, 1867 (14 Stat. 517), an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets, in a Circuit Court of the United States, in a district other than that in which the decree of bankruptcy was made. *Lathrop v. Drake*, 1 Otto, 516.

10. (Oct., 1875.) The jurisdiction conferred upon the federal courts, for the benefit of an assignee in bankruptcy, is concurrent with, and does not divest that of, the state courts, in suits of which they had full cognizance. *Eyster v. Gaff*, 1 Otto, 521.

11. (Oct., 1875.) Under sec. 4979 of the Revised Statutes, the Circuit Court of the United States has, without reference to the citizenship of the parties, jurisdiction of a suit against an assignee in bankruptcy, brought by any person claiming an adverse interest

touching any property, or rights of property, transferable to, or vested in, such assignee. *Burbank v. Bigelow*, 2 Otto, 180.

12. *Lathrop, Assignee, v. Drake et al.* (91 U. S. 516) and *Eyster v. Gaff et al.* (id. 521) cited and approved. *Ib.*

13. (Oct., 1843.) Under the Bankrupt Act of 1841, ch. 9, the Circuit and District Courts have full jurisdiction in equity, in respect to all cases arising in bankruptcy, to do all which is necessary and proper, to accomplish the entire settlement and distribution of the bankrupt's estate, whether the proceedings be formal or summary. *Mitchell v. Great Works Milling & Mfg. Co.*, 2 Story, 648.

14. (May, 1874.) The Circuit Court has jurisdiction of a suit in equity, brought by the assignee of a bankrupt in one state, against citizens of another state, to recover for a debt due the bankrupt estate. *Gindrat v. Dane*, 4 Cliff. 260.

15. It is true that no jurisdiction in such a case is conferred in the late Bankrupt Act, on the Circuit Court, as it is on the District Court. The jurisdiction of the Circuit Court is conferred by the Judiciary Act. *Ib.*

16. (May, 1874.) A bill alleged that one Appleton, a citizen of Massachusetts, had been declared a bankrupt; that subsequently Bowles Bros. & Co., of whom he was general partner, had also been declared bankrupt; and that complainant, a citizen of Massachusetts, had been appointed their assignee. The bill was against Appleton and his assignee in bankruptcy, one Story, and alleged further, that there was in Story's hands a large amount of property, after paying all of Appleton's liabilities, and prayed that Story might be decreed to pay the whole amount, or the surplus after paying Appleton's debts, over to the assignee of Bowles Bros. & Co., on the ground that Appleton's property was liable for the copartnership debts. Demurrer. *Held*, that the Circuit Court had no jurisdiction; demurrer sustained; bill dismissed. *Stevens v. Appleton*, 4 Cliff. 265.

17. (May, 1878.) Circuit Courts have concurrent jurisdiction with District Courts of the same district, of all suits at law or in equity, which may be brought by the assignee in bankruptcy, against any person claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property, of the bankrupt, transferable to, or vested in, such assignee; but the same section provides that no suit at law or in

equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the said property, in any court whatsoever, unless the same is brought within two years from the time the cause of action accrued to or against such assignee. *Scovill v. Shaw*, 4 Cliff. 549.

18. (April, 1825.) The Circuit Courts have jurisdiction of matters arising under the bankrupt law, as they have of any other subject, where the Constitution and laws of the United States give them jurisdiction. *Lucas v. Morris*, 1 Paine, 396.

19. (Aug., 1866.) The rule in the courts of the State of New York is, that while the right of a foreign assignee in bankruptcy, as respects the assets of the bankrupt, must yield to the claims of creditors of the bankrupt seeking the aid of those courts, such foreign assignee may, as the representative of the bankrupt, sue to collect the assets of the bankrupt, to the same extent as the bankrupt could have sued if no bankruptcy had taken place.

Such rule was applied by this court, in a suit brought therein by a foreign assignee in bankruptcy, to collect the assets of the bankrupt's estate. *Hunt v. Jackson*, 5 Blatchf. 349.

20. (Jan., 1873.) Jurisdiction to foreclose a mortgage on the estate of a bankrupt, at the instance of the mortgagee or holder, is not included in the powers to be exercised summarily under the first section of said act. *In re Casey*, 10 Blatchf. 377.

21. (Jan., 1880.) A. and U. were partners. L. had a partnership debt against them. A. transferred his interest in the partnership assets to U., and U. became his debtor therefor. U. became insolvent and assigned his property to M., for the benefit of his creditors. Afterwards, U. was adjudged a bankrupt, and M. became his assignee in bankruptcy, and, as such, recovered the property. L. assigned his debt against U. to Q., and Q. and A. proved their claims against U., in bankruptcy. M., as assignee, had in his hands a dividend on the claim of A. Q. claimed to have attached such dividend by an execution on a judgment in a state court against A. G. afterwards proceeded in the same manner with a debt of his against A., individually. G. then brought this suit to restrain the application of such dividend to the debt of Q., and to have it applied on the debt of G. *Held*, —

(1.) The dividend was not attachable on process from a State

Court, and no court but the Bankruptcy Court could order it to be paid to any one but A.

(2.) If the dividend was attachable, this court could not, by injunction, restrain the proceedings.

(3.) The jurisdiction given to the Circuit Court in bankruptcy matters does not warrant this suit. *Gilbert v. Lynch*, 17 Blatchf. 402.

22. (1871.¹) The Circuit Courts of the United States have not jurisdiction of a case, either at law or in equity, in which a state is plaintiff against its own citizens. The Constitution of the United States does not confer such jurisdiction, nor is it conferred by any act of Congress. Such jurisdiction is not conferred upon the Circuit Court in this case by the Bankrupt Act of 1867, because there are other necessary parties than the assignee in bankruptcy, and without such parties the plaintiff could not sustain this suit in any court. *North Carolina v. Trustees of University & Dewey*, 1 Hughes, 133.

23. (Nov., 1871.) Where an assignee in bankruptcy recovered a fraudulent judgment against an alleged debtor of the bankrupt, and the judgment debtor filed a bill in the Circuit Court to enjoin execution upon the judgment,—*Held*, that the fact that all parties were citizens of the same state did not oust the court of jurisdiction. *Noyes v. Willard*, 1 Woods, 187.

24. (July, 1843.) In all cases arising under the bankrupt law [the act passed Aug. 19, 1841, and repealed March 3, 1843], the Circuit Court has concurrent jurisdiction with the District Court. *McLean v. Lafayette Bank*, 3 McLean, 185.

25. The Circuit Court has jurisdiction in all cases where a suit is brought by the assignee of a bankrupt, or against him. *Ib.*

26. Congress has not given jurisdiction to the state tribunals to carry into effect the bankrupt law. It has not power to vest such a jurisdiction. *Ib.*

27. A state court, by the enforcement of a lien, cannot draw to its jurisdiction the administration of the bankrupt law. *Ib.*

28. Where this effect will result necessarily from the exercise of jurisdiction, the Circuit Court may interpose by injunction, and stay proceedings in the state court. *Ib.*

29. (July, 1843.) The Circuit Court has jurisdiction of such a case [an assignment which was void under the Bankrupt Act

¹ No date is given of this decision.

of Aug. 19, 1841], to set aside the transfer, direct the liens to be paid *pro rata*, and the property not levied upon to be distributed among the creditors of this bankrupt. *McLean v. Meline*, 3 McLean, 199.

30. (July, 1843.) Where there is no allegation of fraud in the bill, and the liens will more than absorb the property of the bankrupt, there is no reason why this court should exercise jurisdiction. *McLean v. Rockey*, 3 McLean, 235.

31. (July, 1845.) In bankruptcy [under the Bankrupt Act of Aug. 19, 1841], the Circuit Court will exercise jurisdiction over distinct interests and parties, on allegations of fraud, in order to adjust liens and make distribution of assets. *M'Lean v. Lafayette Bank*, 3 McLean, 587.

32. (Feb., 1874.) The United States Circuit Court has jurisdiction of a bill by an assignee, to recover money or property of the bankrupt preferentially or fraudulently conveyed. *Flanders v. Abbey*, 6 Biss. 16.

33. (Oct., 1868.) The federal courts have not exclusive jurisdiction of actions in behalf of assignees in bankruptcy. If their rights are not regarded in the state courts, their remedy is under the twenty-fifth section of the Judiciary Act. *Johnson v. Bishop*, Woolw. 324.

34. (1871.) A debtor residing in Kansas was adjudged a bankrupt on the petition of creditors, by the United States District Court for Kansas, and assignees appointed. After the bankruptcy proceedings were instituted, a mortgage creditor commenced a suit to foreclose, in one of the state courts of Indiana, without permission of the bankrupt court, making the assignees defendants. The mortgagee was a resident and a citizen of Minnesota. The assignees in bankruptcy filed a bill in the Circuit Court of the United States for the District of Minnesota against the mortgagee, charging that the mortgage was fraudulent both in fact and under the bankrupt law, and asking a decree to have it declared void, and for an injunction to restrain the defendant from further prosecuting his foreclosure suit in Indiana. *Held*, 1. That the District Court in which bankruptcy proceedings are pending, or the Circuit Court for that district, can, in cases where the suit in the state court is commenced after the proceedings in bankruptcy are instituted, enjoin the plaintiff therein from further prosecuting the same. *Held*, 2.

That in this case the Circuit Court for the Minnesota district had no bankruptcy jurisdiction, and could exercise only its ordinary equity powers, and for this reason the injunction asked for was refused. *Markson v. Heaney*, 1 Dill. 497.

35. (1873.) The Circuit Court of the United States has jurisdiction of a common-law or equity action, brought by an assignee in bankruptcy appointed in another district, where such assignee is a citizen of another state, and the defendant is a citizen of the state where the action is brought, and the amount in dispute exceeds the sum of \$500. *Payson v. Dietz*, 2 Dill. 504.

36. Jurisdiction of the state and federal courts as affected by the Bankrupt Act, considered. *Ib.*

37. (1877.) Suits may be brought in the Circuit Courts of the United States, by assignees in bankruptcy, without reference to the amount or value in controversy. *Payson v. Coffin*, 4 Dill. 386.

38. (Nov., 1872.) The concurrent jurisdiction conferred upon the Circuit Court by sec. 2 of the Bankrupt Act is limited to cases where there is a controversy concerning the right to, or some interest in, some specific thing between the assignee and a third person, and does not include an action to collect a simple debt. *Bachman v. Packard*, 2 Sawyer, 264.

Jurisdiction in Bankruptcy. Appeal.

1. (Oct., 1873.) When, after opposition by a creditor to the discharge of a petitioner in bankruptcy, the District Court discharges him, and the opposing creditor files in the Circuit Court a "petition of appeal," — a petition setting forth the application for the benefit of the Bankrupt Act, the opposition, and the discharge, and praying the Circuit Court for a reversal of the orders of discharge of the District Court, — such "petition of appeal" must be regarded as being a petition for review, under the first clause of the second section of the Bankrupt Act, which gives the Circuit Courts a general superintendence and jurisdiction of all cases and questions arising under the act; and on an affirmance by the Circuit Court of the decree of discharge by the District Court, no appeal lies to this court, though the debt of the opposing creditor discharged be more than \$2,000. *Coit v. Robinson*, 19 Wall. 274.

2. (Oct., 1874.) A proceeding under the Bankrupt Act, in which, by petition in form, the assignee sets forth articulately that A., B., C., &c., claim liens against the bankrupt's estate, the validity of each of which liens he, the assignee, denies, and in which he prays that the parties setting up the liens may be made parties, and be required to answer, each of them, all his charges and allegations as made, and be compelled, each of them, to set forth and state in their respective answers the particulars and facts upon which their respective claims are based, and that, on final hearing, all questions and rights of each and all the parties may be ascertained and determined by the court, and that the petitioner be directed to sell the estate and distribute the proceeds; and in which the assignee prays that he "may have such other and further relief in the premises, and may be further directed in his duties as the nature of the case requires;" in which proceeding the parties asserting the liens answer in form, and the assignee replies in form, — is a "case in equity," within the eighth section of the Bankrupt Act, which gives an *appeal* to the Circuit Court in all cases in equity; and is not a case for the general superintendence and jurisdiction by that court, given in the second section of the act, in cases where no provision for the supervision of the Circuit Court is otherwise made. *Stickney v. Wilt*, 23 Wall. 150.

3. If such a case be taken into the Circuit Court under this general superintending jurisdiction given by the said second section, it is wrongly taken. No jurisdiction exists there, so to review the case. And no appeal lies to this court from the action of the Circuit Court, made under such circumstances, to hear and determine the merits. *Ib.*

4. (Sept., 1871.) The United States Bankrupt Act now in force confers jurisdiction in equity upon the District Courts in certain cases; and appeals may be taken from the District to the Circuit Courts, in all such cases where the debt or damage claimed amounts to more than \$500, provided the appellant complies with the conditions specified in sec. 8 of the act. *Scammon v. Cole*, 3 Cliff. 472.

5. (July, 1869.) Where an appeal, purporting to be taken to this court, under the eighth section of the Bankrupt Act of March 2, 1867 (14 Stat. at Large, 520), by a supposed creditor, whose claim is rejected, from the decision of the District Court,

is not claimed, nor any notice of it given to the clerk of the District Court, and to the assignee, within ten days after the entry of the decision appealed from, this court will dismiss the appeal. *In re Kyler*, 6 Blatchf. 514.

6. (March, 1870.) Where a person claiming to be a creditor of a bankrupt, after the rejection of his claim by the District Court, undertook to appeal from such decision to this court, under sec. 8 of the Bankrupt Act of March 2, 1867 (14 Stat. at Large, 520), but did not comply with the provisions of that section in regard to entering his appeal, or with the provisions of General Order No. 26, prescribed by the Justices of the Supreme Court in regard to filing his appeal, and setting forth a statement in writing of his claim, this court, on motion of the assignee in bankruptcy, dismissed the attempted appeal. *In re Coleman*, 7 Blatchf. 192.

7. (Oct., 1871.) Even if this court can, in a suit in equity, brought in the District Court by an assignee in bankruptcy, to set aside an illegal preference averred to have been obtained in violation of the Bankrupt Act of March 2, 1867 (14 Stat. at Large, 517), review, before a final decree is made in the cause by the District Court, an interlocutory order made by that court therein, such review can be had only by means of an appeal, under the eighth section of the act, and cannot be had by means of a petition of review under the second section of the act. *Warren v. Tenth National Bank*, 9 Blatchf. 193.

8. (Oct., 1871.) Where a suit in equity is brought in the District Court, under the jurisdiction conferred on that court by the second section of the Bankrupt Act of March 2, 1867 (14 Stat. at Large, 518), by an assignee in bankruptcy, against a person claiming an adverse interest touching property vested in the assignee, no appeal can, before a final decree in the suit, be taken to this court, by the defendants therein, from an interlocutory decree made by the District Court. *Clark v. Iselin*, 9 Blatchf. 196.

9. (Jan., 1872.) The District Court, by an order entered June 25, rejected and disallowed the claim of a creditor against the estate of a bankrupt, and awarded to the assignee costs against the claimant to be taxed, and collected by execution. They were taxed April 8, following. The District Court refused to enter, on the application of the claimant, a further or more formal judgment against the claimant for the amount of the taxed

costs, the assignee not asking to have such judgment entered. On April 18, the claimant gave notice of an appeal to this court from the order of June 25. The assignee moved to dismiss the appeal, on the ground that it was not brought within ten days after June 25. *Held*, that the appeal must be dismissed, as not having been taken within the ten days limited by sec. 8 of the Bankrupt Act of March 2, 1867 (14 Stat. at Large, 520). *In re Place et al.*, 9 Blatchf. 369.

10. The order of June 25 was final in such sense that an appeal would lie therefrom. *Ib.*

11. (Jan., 1872.) Where an assignee in bankruptcy proceeded in the District Court, by petition, to recover certain property as assets of the bankrupt, and the respondent answered the petition, and did not object to the form or substance of the proceedings, or to the jurisdiction of the court, but submitted to its jurisdiction, and set up, by his answer, his own title to the property, and prayed that the court would adjudge as to the title between him and the assignee, and it did so adjudge, the Circuit Court, on review, will not consider the question as to whether a more formal suit would or would not have been proper. *In re Clark*, 9 Blatchf. 380.

12. (Jan., 1873.) The review, by the Circuit Court, of an order made by the District Court in the exercise of its summary jurisdiction in bankruptcy, under the first section of the Bankrupt Act of March 2, 1867 (14 Stat. at Large, 517), cannot be had by means of an appeal taken under the eighth section of said act. *In re Casey*, 10 Blatchf. 376.

13. The practice in general use in the Second Circuit for the review of such an order is by a petition to the Circuit Court, setting forth so much of the proceeding in the District Court as is necessary to show the order complained of, and the facts on which it was based, or the evidence, where the facts are in dispute, pointing out specifically the supposed error or errors, and asking a review and reversal, or modification of the order complained of. *Ib.*

14. A mere notice of appeal is not "proper process," for invoking a review of such an order. *Ib.*

15. *Semble*, that the review of such an order may be applied for at any time before the supposed erroneous order is carried into execution. *Ib.*

16. A summary proceeding, by order to show cause, based upon a petition in the District Court, in bankruptcy, asking that the assignee in bankruptcy be directed to pay the mortgage debt out of the estate, and that, in default of payment, the assignee and a subsequent mortgagee be foreclosed of all equity of redemption in the mortgaged premises, cannot, for the purposes of an appeal from an order made thereon, directing that a decree of foreclosure be made in favor of the petitioner upon one mortgage, and in favor of such subsequent mortgagee on another, and ordering a reference to ascertain the amount due on those mortgages, and dismissing the petition as to a third mortgage, but not settling the terms, or conditions, or times when the foreclosure shall become operative, be regarded as a suit, so as to sustain an appeal taken from such order, under the eighth section of said act. *Ib.*

17. Such an order, if regarded as made in a suit, is not a final decree therein. *Ib.*

18. The appeal provided by the said eighth section can be taken only from a final decree. *Ib.*

19. (April, 1873.) Unless the appeal provided for in the eighth section of the Bankrupt Act of March 2, 1867 (14 Stat. at Large, 520), be taken within ten days after the decree is entered, this court acquires no jurisdiction thereby. *Sedgwick v. Fridenberg*, 11 Blatchf. 77.

20. The provision of the second section of the act of June 1, 1872 (17 Stat. at Large, 196), that "no judgment, decree, or order of a District Court, rendered after this act shall take effect, shall be reviewed by a Circuit Court of the United States upon like process or appeal, unless the process be sued out, or the appeal be taken within one year after the entry of the judgment, decree, or order sought to be reviewed," has not changed the provision of the said eighth section of the act of 1867 in that particular. *Ib.*

21. (Nov., 1876.) The filing in this court, under General Order No. 26 in bankruptcy, by a creditor in bankruptcy, of an appeal from a decision rejecting his claim, and of a statement of his claim, within ten days after giving notice of his intention to enter his appeal, are not jurisdictional requisites, and, if the requirements of sec. 4981 of the Revised Statutes in regard to the notice and bond on such appeal are complied with, this court has power to relieve the creditor from any consequences of

not filing such an appeal and statement within such ten days. *Fellows v. Burnap*, 14 Blatchf. 63.

22. (May, 1869.) By the eighth section of the Bankrupt Act, appellate jurisdiction is given to the Circuit Court in four classes of cases: 1. By appeals in cases in equity decided in the District Court, under the jurisdiction created by the act. 2. By writ of error in cases at law decided in the exercise of that jurisdiction. 3. By appeal from decisions rejecting wholly or in part the claims of supposed creditors. 4. By appeal from decisions allowing such claims. *Matter of Alexander*, Chase, 295.

23. The suits belonging to the first two classes seem to be those of which concurrent jurisdiction is given to the Circuit and District Courts by the eighth section; for no jurisdiction of cases at law or in equity relating to the estate, rights, or liabilities of the bankrupt is expressly given to the District Court elsewhere than in the third clause of the second section; though this jurisdiction may be well enough held to be included in the general grant of the first section. *Ib.*

24. The appellate jurisdiction, strictly so called, conferred upon the Circuit Courts, is limited to controversies between assignees and the claimants of adverse interests, and to controversies between assignees and creditor-claimants, touching the allowance of claims. *Ib.*

25. The right of appeal, as given by the statute, can neither be enlarged nor restricted by the District or the Circuit Court. The regulation of appeals is a regulation of jurisdiction. The Circuit Court has no jurisdiction of any appeal, in any case, under the Bankrupt Act, from the District Court, unless it is claimed, and the bond is filed at the time it is claimed, and notice of it is given, as required by the eighth section of the act, within ten days after the entry of the decree or decision appealed from: or unless it is entered at the term of the Circuit Court first held within and for the proper district next after the expiration of the ten days from the time it was claimed. *Ib.*

26. (June, 1876.) A proceeding in the District Court in the nature of a suit in equity, brought by the assignee and creditors of a bankrupt, to set aside the claim of an alleged creditor, and to abrogate the lien asserted by him on the bankrupt's property, is appealable to the Circuit Court, under sec. 4980 of the Revised Statutes. *Morris v. Brush's Executors*, 2 Woods, 354.

27. A compliance with General Order in Bankruptcy XXVI., in relation to the time of filing such appeal in the Circuit Court, is not necessary, to give the court jurisdiction. *Ib.*

28. But the order mentioned is a rule of practice in the Circuit Court; and if disregarded, the appellee has *prima facie* ground on which to move to dismiss the appeal. *Ib.*

29. A transcript of the proceedings of the District Court is not required to be filed within the ten days prescribed for filing the appeal in the Circuit Court, but only a statement of appellant's claim and a brief account of what has been done in the District Court, and the grounds of appeal. *Ib.*

30. Where the decree of the District Court, disallowing a claim against a bankrupt estate, was entered on January 21, notice of appeal given January 27, and the appeal bond filed in the clerk's office of the District Court on January 28; and before the next term of the Circuit Court, but not until May 22, the declaration of appellant, setting forth his claim and the history of the proceedings, was filed in the Circuit Court, at which time a transcript of the proceedings in the District Court was also filed, — *Held*, that the Circuit Court had jurisdiction of the case, and could hear it or not, in its discretion, according as it might or might not be satisfied with the excuse offered for the delay in filing the papers. *Ib.*

31. (Oct., 1868.) In the Bankrupt Act, the right to review by appeal, or writ of error, depends not on the nature "of the matter in dispute," but on the "amount of the debt or damages claimed." And the question again recurs, Is any debt or damages claimed by a creditor who resists the bankrupt's discharge? [*Quære.*] *Ruddick v. Billings*, Woolw. 336.

32. (1870.) Appeals in equity cases, under the Bankrupt Act, from the District to the Circuit Court, are regulated by sec. 8, and General Order 26 in bankruptcy framed by the Supreme Court; and where, in an equity case, the record did not show that an appeal was claimed, or notice given, and contained no bond, it was dismissed by the Circuit Court. *Hawkins v. Hastings National Bank*, 1 Dill. 453.

Jurisdiction in Bankruptcy. General Superintendence.

1. (Oct., 1877.) The supervisory and the appellate jurisdiction of the Circuit Court, in cases arising under the Bankrupt Acts, distinguished. *Milner v. Meek*, 5 Otto, 252.

2. (Oct., 1878.) No particular form of proceeding is required to remove such a case to the Circuit Court [from the District Court, for supervisory jurisdiction in bankruptcy]. It is sufficient if some "proper process" is used. *Cleveland Ins. Co. v. Globe Ins. Co.*, 8 Otto, 366.

3. A writ of error, employed as "process," for the purposes of that jurisdiction, will not deprive the Circuit Court of its power to proceed. *Ib.*

4. (Nov., 1868.) This court refused to review an incidental question of practice, in a bankruptcy proceeding, in the District Court. *In re Robinson*, 6 Blatchf. 253.

5. (Feb., 1870.) The nature of the superintending or revisory power given to the Circuit Court, over proceedings in bankruptcy, by the second section of the Bankrupt Act of March 2, 1867 (14 Stat. at Large, 518), considered and stated. *In re Bininger*, 7 Blatchf. 159.

6. The superintendence and jurisdiction conferred upon this court by the second section of the Bankrupt Act of March 2, 1867 (14 Stat. at Large, 518), is revisory, and does not confer on this court the power specifically to execute the decrees of the District Court, or to assume the primary exercise of the jurisdiction conferred on the District Court by the first section of that act. *Ib.*

7. (Feb., 1870.) Where C., adjudged a bankrupt by a decree of the District Court, was seeking a review of such decree by this court, and was at the same time prosecuting suits in a state court to restrain the proceedings in the District Court, — *Held*, that this court would not require C. to elect whether to prosecute further such review or the suits in the state court. *In re Bininger*, 7 Blatchf. 168.

8. (Jan., 1872.) *Semble*, that the mode of review of an order made in the exercise of summary jurisdiction is not by an appeal, under the eighth section of the Bankrupt Act. *In re Clark*, 9 Blatchf. 372.

9. (Jan., 1872.) The jurisdiction of the Circuit Court, to

review summary proceedings in bankruptcy, is not limited by any measure of the value of the property involved. *In re Clark*, 9 Blatchf. 379.

10. A petition of review, in bankruptcy, merely reciting the proceedings in the District Court, and its decree, and alleging that the petitioner is aggrieved thereby, and praying a review and a reversal, without pointing out any errors, or supposed errors, in law or in fact, or specifying any ground or reason for such reversal, except that the petitioner is aggrieved, commented on, as loose practice, not to be sanctioned. *Ib.*

11. The review given to the Circuit Court by the second section of the Bankrupt Act of March 2, 1867 (14 Stat. at Large, 518), is given to it as a court of equity; and it is not bound to reverse upon strictly legal grounds, if satisfied that the facts are correctly found, and that no injustice has been done. *Ib.*

12. (June, 1874.) The approved practice in this circuit is, to review in the Circuit Court by petition, and not by bill, an order made by the District Court, in bankruptcy, in the exercise of the summary jurisdiction of the District Court. *Hurst v. Teft*, 12 Blatchf. 217.

13. The Circuit Court has, however, jurisdiction to review such an order, on a bill filed in the Circuit Court, in a plenary suit, for the purpose, in the absence of any rule of the Circuit Court to the contrary. But a review in such manner is not favored. *Ib.*

14. (Nov., 1876.) A discharge in bankruptcy was granted by the District Court, June 22, 1875. A creditor who had opposed the discharge instituted, on the 15th of November following, proceedings of review. His interest was \$6,000 out of \$300,000 of debts. On the faith of the discharge, the bankrupt, aided by friends, had resumed his former business, and had entered into contracts with a foreign government to transport mails. *Held*, that as the delay was unreasonable, and had operated to the prejudice of the bankrupt, the petition of review must be dismissed. *In re Murray*, 14 Blatchf. 43.

15. (May, 1869.) The jurisdiction of superintendence conferred upon the Circuit Court by the second section of the Bankrupt Act must be exercised over proceedings in bankruptcy already pending in the District Court, and it seems to be a

reasonable interpretation that it does not extend to decisions of the District Court from which appeals may be taken. *Matter of Alexander*, Chase, 295.

16. The only construction which gives due effect to all parts of the act relating to revisory jurisdiction seems to be that which, on the one hand, excludes from the category of general superintendence and jurisdiction of the Circuit Court the appellate jurisdiction defined by the eighth section; and, on the other, brings within that category all decisions of the District Court or the District Judge at chambers, which cannot be reviewed upon appeal or writ of error, under the provisions of that section. *Ib.*

17. The exercise of this jurisdiction is left to the sound discretion of the Circuit Courts. *Ib.*

18. (Nov., 1874.) The removal of an assignee in bankruptcy by the District Court, for a "cause which in its judgment renders such removal necessary or expedient," is not such a case or question as can be reviewed by the Circuit Court. *In re Adler & Brothers*, 2 Woods, 571.

19. (Nov., 1870.) A revisory petition to the Circuit Court, under the second section of the Bankrupt Act, must show wherein the error in the order or ruling of the District Court complained of consists, and its nature must be distinctly set forth. The case will not be taken up *de novo*. *In re Sutherland*, 2 Biss. 405.

20. (Oct., 1868.) The second section of the Bankrupt Act confers on the Circuit Court complete and unlimited control over proceedings in bankruptcy, including the whole case, so that it may be removed from the District Court, and also any separate branch of it, or any particular question arising in it. *Ruddick v. Billings*, Woolw. 331.

21. And it may assume and exercise this jurisdiction by bill, petition, writ of error, writ of *certiorari*, or other appropriate process. *Ib.*

22. It would seem that the proper process by which to remove from the District to the Circuit Court an order granting or refusing a discharge is by petition, under the second section of the act. *Ib.*

23. (1872.) The District Court has large discretionary powers in matters of bankruptcy; and the Circuit Court will not interfere with the exercise of such powers, and set aside the appoint-

ment by the District Court of an assignee, in a case where it is only claimed that the District Court erred in holding that no election had been made by the creditors, there being no allegation against the fitness of the person appointed. *Woods v. Buckewell*, 2 Dill. 38.

24. Nature of the jurisdiction conferred upon the Circuit Courts by the second section of the Bankrupt Act considered by Mr. Justice Miller. *Ib.*

25. (1873.) The second section of the Bankrupt Act gives to the Circuit Court jurisdiction to review, upon a proper record, an order of the District Court, upon a trial before it without a jury, adjudicating the petitioner a bankrupt. *In re Picton*, 2 Dill. 548.

26. Where all of the testimony in the District Court, on the trial of such an issue, was reduced to writing, preserved by bill of exception, and certified to the Circuit Court, the latter court can review the correctness of the order of the District Court adjudging the petitioner a bankrupt. *Ib.*

27. (Dec., 1875.) A stay of proceedings in bankruptcy in the District Court is in the discretion of the Circuit Court, and ought not to be granted where it does not appear that the rights of the defendant will be prejudiced or seriously endangered, if the plaintiff is allowed to proceed to final judgment in the court below. *In re Oregon Bulletin Co.*, 3 Sawyer, 529.

28. *Semble*, that *all* the appellate jurisdiction of the Circuit Courts in bankruptcy is conferred upon them by sec. 4986 of the Revised Statutes, and that sec. 4980 of said Revised Statutes to sec. 4984, inclusive, do not confer any such power, but only regulate its exercise; that the terms *cases* and *questions* are used in said sec. 4986 in contradistinction to one another; that a case in bankruptcy, whether at law or in equity, is only reviewable in the Circuit Court according to the mode prescribed in ordinary actions at law or suits in equity; and that the appellate jurisdiction which the Circuit Courts may exercise upon bill or petition is confined to the review of the action of the District Courts upon isolated questions arising in the proceedings subsequent to an adjudication in bankruptcy. *Ib.*

Appeals in Admiralty Causes.

SEC. 631. From all final decrees of a District Court in causes of equity or of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, an appeal shall be allowed to the Circuit Court next to be held in such district, and such Circuit Court is required to receive, hear, and determine such appeal.

24 Sept., 1789, c. 20, s. 21, v. 1, p. 83.

3 March, 1803, c. 40, s. 2, v. 2, p. 244.

3 June, 1864, c. 170, s. 13, v. 13, p. 310.

1 June, 1872, c. 255, s. 2, v. 17, p. 196.

16 Feb., 1875, c. 77, v. 18, p. 315.

Admiralty Appeal. Matter in Dispute.

1. (Jan., 1832.) It is very clear that no seaman can appeal from the District to the Circuit Court, unless his own claim exceeds \$50. . . . *Oliver v. Alexander*, 6 Pet. 144.

2. (May, 1825.) In suits for assaults and batteries on the high seas, no appeal can be sustained from a decree of the District Court, unless there be an *ad damnum* laid in the libel exceeding \$50. *Jenks v. Lewis*, 3 Mason, 503.

3. (Oct., 1833.) No appeal lies by any party, from a decree of the District Court, unless on his part the matter in dispute exceeds the sum or value of \$50, under the acts of Congress. *Shirley v. Titus*, 1 Sumn. 447.

4. (May, 1855.) In a cause of subtraction of wages, *in rem*, one of the owners having claimed and answered, the District Court decreed in favor of the wages, amounting to more than \$50; the vessel having been sold, produced less than \$50, after paying charges. The claimant was denied an appeal by the District Court. *Held*, that as the decree would conclude the owner, in a suit *in personam*, the wages were the matter in dispute, and the appeal should be allowed. *The Enterprise*, 2 Curt. C. C. 317.

5. (Oct., 1870.) Since the passage of the act of March 3, 1803, appeals are allowed to the Circuit Court, from any decree rendered in the District Court, in any cause of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of

costs, exceeds the sum or value of \$50. *Ayer v. Steamer Glaucus*, 4 Cliff. 166.

6. (Oct., 1851.) Where an action *in personam* is brought in the District Court, in admiralty, on a money demand amounting to less than \$50, but the libellant's claim, with interest, amounts to more than \$50 at the time the decree is made by the District Court, and he has a decree in that court for more than \$50, an appeal lies to this court from such a decree. *Godfrey v. Gilmartin*, 2 Blatchf. 340.

7. On such an appeal, the action becomes a plenary suit in this court, and, if the decree is affirmed by this court, with costs, full costs of this court may be taxed. *Ib.*

8. (April, 1838.) It is the claim of the libellant, and the answer of the respondent, denying the claim, that make the controversy and ascertain the amount in dispute. *Agnew v. Dorman*, Taney's Dec. 386.

9. Where property is in dispute, and the value of it is not averred, and does not appear in the record, parol testimony has been received in the Supreme Court, upon appeal, to show its value, and to show the jurisdiction of the court. *Ib.*

10. And so, too, as to the value of an office, where the right to the office is the matter in controversy. *Ib.*

11. But where the controversy relates merely to the amount of money which one party is entitled to recover from the other, the record must show the amount in dispute, in order to give jurisdiction to the appellate court. *Ib.*

Admiralty Appeal. When it lies and when it does not lie.

1. (Aug., 1796.) BY THE COURT: We are perfectly satisfied upon the two points that have been agitated in this cause. In the first place, we think that it is a cause of admiralty and maritime jurisdiction. The exportation of arms and ammunition is, simply, the offense; and exportation is entirely a water transaction. It appears, indeed, on the face of the libel, to have been commenced at Sandy Hook, which certainly must have been upon the water.

In the next place, we are unanimously of opinion that it is a civil cause. It is a process of the nature of a libel *in rem*, and does not in any degree touch the person of the offender.

. . . The appeal to the Circuit Court was regular, as it was

a cause of admiralty and maritime jurisdiction. *United States v. La Vengeance*, 3 Dall. 297.

2. (Jan., 1832.) No provision is made for an appeal by the government; of course none was intended to be given to it. *United States v. Nourse*, 6 Pet. 470.

3. It appears that no provision is made in the general act organizing the courts of the United States, to authorize an appeal from the judgment or decree of a District Court, to the Circuit Court, except in cases of admiralty and maritime jurisdiction. On the principle of the case of the *United States v. Goodwin* the appeal in this case cannot be maintained. If it be a case in chancery, no provision is made in the general law to appeal such a case from the District to the Circuit Court. *Ib.*

4. (Dec., 1856.) Where the decree of the District Court in a case of admiralty jurisdiction was not a final decree, the Circuit Court, to which it was carried by appeal, had no power to act upon the case, nor could it consent to an amendment of the record by an insertion of a final decree, by an agreement of the counsel in the case; nor can this court consent to such an amendment. *Mordecai v. Lindsay*, 19 How. 199.

5. (Dec., 1858.) Where the District Court of the United States, sitting in admiralty, decreed that a sum of money was due, but the amount to be paid was dependent upon other claims that might be established, this was not such a final decree as would justify an appeal to the Circuit Court. *Montgomery v. Anderson*, 21 How. 386.

6. The Circuit Court, therefore, had no jurisdiction, and its judgment affirming the decree of the District Court, and remanding the case to that court, was erroneous. *Ib.*

7. Moreover, if it had jurisdiction, it was not authorized to remand the case to the District Court. The appeal had carried up the fund, and the Circuit Court should have executed its own decree. *Ib.*

8. An agreement of counsel, filed in this court, stating that the whole fund has been distributed, will not correct the error. This court has heretofore decided that consent of counsel will not confer jurisdiction. *Ib.*

9. The decree of the Circuit Court must be reversed, and the case remanded to that court, with directions to dismiss the case for want of jurisdiction. *Ib.*

10. (Oct., 1873.) Where an appeal is taken to the Circuit Court from the decree of the District Court, in a proceeding *in rem*, the property or its proceeds follows the cause into the former court. *The Lottawanna*, 20 Wall. 201.

11. (Oct., 1812.) The Circuit Court of Massachusetts has no cognizance of causes of admiralty and maritime jurisdiction from the District Court of Maine, except by appeal, and a writ of error thereon will be quashed. *McLellan v. United States*, 1 Gall. 227.

12. (May, 1813.) If, in a prize cause, the claimant appeal and desert his appeal, the Circuit Court may affirm the decree of the District Court with costs. *Privateer Montgomery v. Schooner Betsey*, 1 Gall. 416.

13. (Oct., 1813.) On an appeal to the Circuit Court, the property follows the appeal into that court. *The Grotius and Cargo*, 1 Gall. 503.

14. (Oct., 1818.) The Circuit Court has no jurisdiction in causes of admiralty and maritime jurisdiction, except over the final decrees of the District Court. *Brig Hollen*, 1 Mason, 431.

15. (Oct., 1834.) In a libel for a maritime trespass, assault and battery, against two respondents, if there is joint decree for damages, either of the respondents may appeal without joining the other, where the respondents have severed in their pleadings or answers, or jointly pleaded a negative plea in the nature of the general issue. But it seems otherwise if they had pleaded a joint justification. *Thomas v. Lane*, 2 Sumn. 1.

16. (May, 1839.) A decree awarding a certain rate of salvage of the proceeds, after deducting charges and expenses, and fees of court, is not a final decree, but at most is only an interlocutory decree, in the nature of a final decree. *Steamboat New England*, 3 Sumn. 495.

17. To make a decree in a salvage case positively final, all the charges and expenses should be ascertained, and the salvage apportioned, and the rights of each salvor definitely fixed, so that he may appeal therefrom if he chooses. *Id.*

18. (Oct., 1853.) This court will not decline jurisdiction of an appeal in a case of personal damage brought by an American seaman serving on board a British vessel, when the voyage was terminated here, and the master was domiciled in the United States. *Patch v. Marshall*, 1 Curt. C. C. 452.

19. Though the court will not call in question the official acts of a British consul in a foreign court, respecting the crew of a British vessel, it does not follow that it will not investigate the conduct of the master, in procuring the intervention of the consul, by which the seaman was imprisoned; if that amounts to a tort, so as to render the master liable for the imprisonment, it stands on the same ground as other torts. *Ib.*

20. (April, 1866.) A party not appealing from the decision of the District Court can, in this court, only be heard in support of the decree of the court below. *Bush v. Schooner Alonzo*, 2 Cliff. 548.

21. (April, 1835.) The decision of a district judge awarding a perpetual injunction against a treasury warrant of distress is a final decree, within the act of Congress of March 3, 1803, which allows an appeal from all final judgments or decrees of a District Court to the Circuit Court. *Porter ads. United States*, 2 Paine, 313.

22. The act of Congress of April 9, 1814, dividing the State of New York into two districts, intended that the two courts should stand, in relation to the Circuit Court, precisely as the single one had previously stood. Consequently the District Court of the Northern District is placed in the same relation to the Circuit Court as that of the Southern District, and an appeal lies from it to this court to the same extent. *Ib.*

23. (Sept., 1857.) No appeal lies to this court from a decree of a District Court in admiralty, dismissing a libel *in rem* for want of prosecution. *The Merchant*, 4 Blatchf. 105.

24. Such a decree is not final, or conclusive of the subject-matter of the litigation between the parties. *Ib.*

25. The remedy of the aggrieved party is to bring a fresh suit. *Ib.*

26. (May, 1859.) Where, on a libel *in rem*, in the District Court, against a vessel, on a bottomry bond for \$9,240, that court made a provisional decree in favor of the libellant for \$4,000, with interest and costs, with liberty to either party, within twenty days, to take an order of reference to a commissioner, to ascertain and report the amount of the sums composing the bottomry debt, and what portions thereof had been previously a lien upon the vessel, and, on the coming in of the report, either party to be at liberty to move the court to frame

the decree in correspondence therewith, and the libellant appealed to this court from that decree, but no other steps were taken by either party in the court below, subsequently to the entry of the decree, — *Held*, that the decree was not a final decree from which an appeal would lie to this court. *The Yuba*, 4 Blatchf. 314.

27. (Sept., 1878.) In a suit *in personam*, in admiralty, in the District Court, money in the hands of a garnishee was attached, under process of foreign attachment, as the property of the respondent. The garnishee claimed that the fund was the property of P. On the trial of that issue, the District Court made a decree that the money belonged to the respondent, and that the garnishee must pay it into court. From that decree the garnishee appealed to this court. Afterwards, the District Court made a money decree against the respondent, and awarded execution on it against the money in the hands of the garnishee. The garnishee appealed to this court from that decree. *Held*, that the second decree was the only final decree, and that the first appeal was irregular, and must be dismissed with costs. *Cushing v. Laird*, 15 Blatchf. 219.

28. (July, 1840.) Appeals from the District to the Circuit Court are limited to cases of admiralty and maritime jurisdiction. *United States v. Hayes*, 2 McLean, 155.

29. All other cases from the District to the Circuit Court are removed by writ of error. *Ib.*

30. (Feb., 1872.) An appeal or writ of error in the name of a steamboat, or any other than that of a human being, or some corporate or associated aggregation of persons, cannot be sustained. *Steamer Spark v. Lee Choi Chum*, 1 Sawyer, 713.

31. An appeal in the name of a firm, without stating the names of the individuals composing the firm, is nugatory. *Ib.*

32. No one but a party in some form to the action can appeal, or can be heard in any stage of the proceedings in the court below. *Ib.*

Admiralty Appeal. Funds.

1. (Sept., 1853.) An appeal [in admiralty] to this court from the District Court, when regular, brings with it into this court all the funds, if any, belonging to the case; and, in case of an ap-

peal from this court to the Supreme Court, the funds still remain in this court. *Hayford v. Griffith*, 3 Blatchf. 34.

Admiralty Appeal. Motion to dismiss.

1. (Feb., 1870.) Where, in a suit *in personam* in admiralty, after answer, a decree was taken by default for the libellant at the hearing in the District Court, and a reference was made to a commissioner to take proof of damages, and the respondent appeared before the commissioner and contested the amount of damages, and the commissioner made a report, to which no exception was taken, and a final decree was entered, from which the respondent appealed to this court, and the libellant then moved this court to dismiss the appeal, — *Held*, that the motion must be denied, and the case be heard in the usual way on the call of the calendar. *Farrell v. Campbell*, 7 Blatchf. 158.

Admiralty. Party not appealing.

1. (May, 1870.) Where, in a collision case, the District Court had found both parties in fault and divided the loss, and the respondents only appealed, the libellants are bound by the decree as to the fault on their part, and the Circuit Court, on appeal, cannot inquire as to that point. The only subject of inquiry is whether the respondents were in fault. *The Quickstep*, 2 Biss. 291.

Admiralty Appeal. Time.

1. (Oct., 1824.) An appeal from a decree of the District Court must be taken in open court before the adjournment *sine die*, unless a different period be prescribed by the court. *Norton v. Rich*, 3 Mason, 443.

2. (May, 1839.) No appeal lies from a decree of the District Court in an admiralty cause, except to the next term of the Circuit Court. *Steamboat New England*, 3 Sumn. 495.

3. The appeal, to be effectual, must be entered before the adjournment *sine die* of the District Court, unless a different time is specially allowed by the District Court in the particular case, or is prescribed by the general rules of the court. *Id.*

4. If in either case an appeal is entered within the prescribed

term, it relates back to the time of the decree, although actually entered in vacation. *Ib.*

5. A party may appeal from an interlocutory decree, having the effect of a final decree; or he may, at his election, wait until the final decree is positively entered, and then may enter an appeal. *Ib.*

6. (Oct., 1852.) An appeal from the District Court is properly entered at the term of the Circuit Court begun next after the entry of the decree in the District Court, although the term of the District Court, during which the decree was entered, had not been ended when the term of the Circuit Court was begun. *United States v. Certain Hogsheads of Molasses*, 1 Curt. C. C. 276.

7. (May, 1855.) After a final decree has been made by a District Court, sitting in admiralty, and the court has adjourned without day, the decree cannot be set aside or opened so as to allow an appeal to the Circuit Court, a term whereof has intervened since the decree was made. *United States v. Brig Glamorgan*, 2 Curt. C. C. 236.

8. If an appeal from such a decree be not taken to the term of the Circuit Court held next after the making of the decree, the right is lost. *Ib.*

9. (Jan., 1856.) After the expiration of ten days from the rendering of a judgment or decree, within which time the party appealing or suing out a writ of error must, if he desires to stay execution, serve a copy of his petition of appeal or writ of error, and of its allowance, by lodging a copy thereof in the clerk's office for the adverse party, this court has no power, under sec. 23 of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 85), or under sec. 2 of the act of March 3, 1803 (2 id. 244), to permit such service to be made *nunc pro tunc*, as if made within such ten days. *The Roanoke*, 3 Blatchf. 390.

10. All the requirements of the statute, necessary for the stay of execution, must be complied with within the ten days. *Ib.*

11. (April, 1870.) An appeal in a case of admiralty and maritime jurisdiction, not taken to the next term of the Circuit Court after the rendition of the decree in the District Court, will be dismissed. *United States v. \$5,100 in Specie*, 1 Woods, 14.

12. (July, 1840.) An appeal from the District to the Circuit Court must be prayed for and allowed to the next Circuit

Court held within the district. *United States v. Hayes*, 2 McLean, 155.

13. (June, 1855.) If the appellant [in admiralty] delay to perfect his appeal, so that the record is filed a very short time before the term of this court, the appellee may notice the cause for hearing, or continue it, at his option. *Backus v. Schooner Marengo*, 6 McLean, 499.

14. No one should take advantage of his own remissness, to the prejudice of the other party. *Ib.*

Admiralty Appeal. Security.

1. (Sept., 1853.) An appeal from a decree of the District Court in admiralty, to this court, is not regular, unless the appellant gives sufficient security to answer the costs in case of affirmance. *Hayford v. Griffith*, 3 Blatchf. 34.

2. Such security is necessary to the regularity of the appeal, even though execution has been issued on the decree in the District Court, in the absence of the security required to operate as a *supersedeas*. *Ib.*

Admiralty Appeal. Citation. Notice.

1. (Sept., 1857.) On an appeal to this court, from a decree of the District Court, in admiralty, no citation is necessary, but only a written notice by the proctor, to the proctor of the adverse party. *The Ellen*, 4 Blatchf. 107.

2. The second section of the act of March 3, 1803 (2 Stat. at Large, 244), made no change as to the mode of practice in bringing such an appeal. *Ib.*

3. (Dec., 1870.) Where no rule is prescribed by the court, the practice of the court as to notice of appeal, and the giving and approval of the appeal bond, make the rule by which parties must be governed. *Otis v. The Rio Grande*, 1 Woods, 593.

4. Where notice of appeal in an admiralty cause is given in open court, immediately upon the rendition of the decree, and written notice thereby filed with the clerk, and the penalty of the appeal bond fixed by the court, and an appeal bond in the penalty as fixed by the court is filed, and approved by the clerk before the close of the term at which the decree appealed from is

rendered, — *Held*, that the appeal was well taken, although neither the term docket nor minutes of the District Court recited any of the foregoing facts, or contained any evidence of the appeal. *Ib.*

5. (Feb., 1872.) A citation is necessary, unless the appeal is allowed in open court. *Quære*, Whether a citation is not always necessary, if the Consular Court has once adjourned after rendering a decree, there being no terms of such courts. *Steamer Spark v. Lee Choi Chum*, 1 Sawyer, 713.

Admiralty Appeal. Amendment.

1. (Feb., 1816.) In revenue or instance causes, the Circuit Court may, upon appeal, allow the introduction of a new allegation into the information, by way of amendment. *The Edward*, 1 Wheat. 261.

2. (May, 1812.) The Circuit Court has authority to allow amendments in revenue causes or proceedings *in rem*, brought by appeal from the District Court. *Anonymous*, 1 Gall. 22.

3. (May, 1833.) In admiralty proceedings, a supplementary libel alleging new matter, and an answer thereto, may be filed after appeal, in the discretion of the court. *Schooner Boston*, 1 Sumn. 328.

4. (May, 1835.) Appellate courts in admiralty allow parties, under certain circumstances, *non allegata allegare, et non probata probare*. *Brig Sarah Ann*, 2 Sumn. 206.

5. (May, 1844.) In cases of appeal from the District Court, this court is very cautious in admitting new matters of defense or allegation to be introduced, where the facts on which they rest are not new or newly discovered, but were perfectly known at or before the hearing in the District Court. *Coffin v. Jenkins*, 3 Story, 108.

6. (Sept., 1825.) The Circuit Courts, on appeal from the District Courts, have power, by the thirty-second section of the Judiciary Act, to allow an amendment of defects in form occurring in the court below, which could have been amended there, or to disregard them in giving judgment. *Smith v. Jackson*, 1 Paine, 486.

7. But this power does not extend to defects in substance. *Ib.*

8. (March, 1832.) Amendments in a case rest in the sound

discretion of the court where the proceedings are pending ; and the order of the court, in this respect, cannot be called in question in the appellate court. *Brown v. Brig Cadmus*, 2 Paine, 564.

9. (Oct., 1853.) On an appeal from a decree of the District Court, dismissing a libel *in rem* for the foreclosure of a mortgage on the vessel, this court will not permit the libel to be amended so as to convert the suit into an action to recover possession of the vessel. *The John Jay*, 3 Blatchf. 67.

10. (April, 1870.) An amendment of the libel as to the amount of damages claimed, in a suit on a collision, allowed, to remove a formal difficulty in the way of a just award. *The St. John*, 7 Blatchf. 220.

11. (May, 1874.) In a case of collision, this court decreed for the libellant. The Supreme Court, on appeal, held that both vessels were guilty of fault which contributed to the collision. The claimant, not having alleged, in his answer, that he had sustained any damages by the collision, moved, on the presentation of the mandate from the Supreme Court, that he be allowed to amend his answer in that respect. *Held*, that the motion ought to be granted, and such damages ascertained by a reference, and then brought into an apportionment with the amount of damages already found to have been sustained by the libellant. *The Pennsylvania*, 12 Blatchf. 67.

12. (April, 1849.) An appellee in admiralty may amend in this court the libel he has filed in the District Court, so as to make a claim here for damages above costs, caused by a vexatious appeal. *Weaver v. Thomson*, 1 Wall. Jr. 343.

13. (April, 1838.) A libel was filed in the District Court, by a seaman, against the master of a vessel, to recover a balance of \$30.95, claimed to be due for wages ; and also damages for an assault committed upon the libellant by the master, without claiming any particular amount of damages. The libel was dismissed by the District Court, and in the Circuit Court, to which the case was taken by appeal, a motion was made to dismiss the appeal, on the ground that the record did not show that the sum in controversy amounted to \$50. A motion was thereupon made by the appellant to amend his libel, by inserting that he had sustained damages, by the assault, to the amount of \$300. One of the witnesses had proved that he would not have run the risk of

the blow given to the libellant for \$100. *Held*, that the amendment asked for could not be made; that the Circuit Court had no authority to review the decree of the District Court, unless the sum in controversy amounted to \$50; and that the court could not permit an amendment to be made, the object of which was to change the record so as to give the court jurisdiction, in a case where, according to the record before them, they had none. *Agnew v. Dorman*, Taney's Dec. 386.

14. (Nov., 1845.) If any persons have joined in a libel who are not competent to sue for the matter complained of, the Circuit Court, although an appellate court, will give leave to amend, and to strike out the names of parties improperly introduced, so as to enable it to dispose of the appeal upon its real and substantial merits. *Taylor v. Harwood*, Taney's Dec. 437.

15. (April, 1851.) The Circuit Court, upon appeals from the court of admiralty, has the power to suffer amendments to be made to the pleadings, so as to let in new evidence and new grounds of defense. *Reppert v. Robinson*, Taney's Dec. 493.

16. But this power ought always to be exercised with caution, and for the purposes of justice, and to bring the merits of the controversy fairly before the court. It would hardly be consistent with these principles to permit the amendment to be made, where the only effect it would produce would be the defeat of the present suit, and driving the libellant to another forum to recover a claim admitted to be due, and the justice of which is not disputed. *Id.*

Admiralty. Pleadings.

1. (Oct., 1880.) A ship-owner who, on the trial of the issue as to the cause of collision, contests all liability whatever, is not thereby precluded from claiming the benefit of the limitation of liability provided by sec. 4283 of the Revised Statutes.

The Supreme Court, in reversing the decree of the Circuit Court, directs that court to proceed upon the petition for limited liability, and promulgates a rule that such a petition shall be hereafter filed in the Circuit Court when the case is there pending. *The Benefactor*, 13 Otto, 239.

2. (April, 1821.) Libel to carry into execution a sentence of the Circuit Court of Rhode Island, against Graham, a resident citizen of Pennsylvania, for the value of a box of merchandise

condemned by that court, and which was charged to have come into his hands after condemnation. Plea: that the defendant had not been served with process in the district of Rhode Island, and was not a party to the proceedings in that court. *Wilson v. Graham*, 4 Wash. 53.

3. The Circuit Court of Rhode Island had no jurisdiction against Graham *in personam*, as he was a citizen of Pennsylvania, and was not served with process in Rhode Island. The decree of that court is conclusive against the merchandise; and upon a proper application to this court, the court would not hesitate to give it effect against the appellee in respect to the merchandise; if it should appear that he had, or has possession of them or their proceeds. As to the *thing*, Graham, and all others claiming it on the ground of property or possession, were parties to that suit, and were represented by it in that court, although they were not served with process, or had not heard of the proceedings. *Ib.*

4. Where a specific relief is asked for, even though there be a prayer for general relief, the Circuit Court cannot grant a relief which is inconsistent with, or entirely different from, that which is prayed. *Ib.*

5. The respondent is, however, bound to put his defense upon the answer, and reserve it for a final hearing; but may, if it be a fit subject for a plea, put it into that shape, in order to save the expense of going into a general examination. *Ib.*

Admiralty. Further Proof on Appeal.

1. (Oct., 1815.) In general, the prize court will not trust a claimant with an order for further proof, who has shown himself capable of abusing it. *The S. J. Indiano*, 1 Mason, 38.

2. (May, 1830.) Notwithstanding an order of the court, closing all testimony in a cause after a limited time under a commission, the court will enlarge it upon proof of newly discovered evidence which the party could not procure to be taken under such commission, the same having come to his knowledge after the execution thereof. *Schooner Ruby*, 5 Mason, 451.

3. (June, 1868.) Where, on a libel *in personam*, in the District Court, against a corporation for a collision alleged to have been caused by a vessel owned by it, the libel was dismissed by that court, on the ground that there was no such corporation, and

that it did not own such vessel, and no testimony was put in in that court as to the merits by the respondents, and, on appeal by the libellants to this court, such objections were removed by evidence, this court, on reversing the decree, allowed both parties to take proofs on the merits in this court, with liberty to either party to amend his pleading. *Remington v. Atlantic Royal Mail Steam Navigation Co.*, 6 Blatchf. 153.

4. (April, 1870.) It is not competent, on an appeal in admiralty, to ask this court to send the case back to the commissioner, on the ground that he rejected evidence offered before him, on the reference in the District Court as to damages, where the question as to the rejection of such evidence was not raised in the District Court. *The Vicksburg*, 7 Blatchf. 216.

5. (April, 1849.) When an admiralty case comes into this court, on an appeal from the District Court, either side, by the practice of the Third Circuit, is at liberty to take new evidence. But, generally speaking, where the decree of the District Court is reversed because it was given on a different state of facts from that presented to this court, the party succeeding here does not have costs. *Carrigan v. The Charles Pittman*, 1 Wall. Jr. 307.

6. (Nov., 1845.) New testimony introduced in an appellate court, in admiralty proceedings, is always listened to with great caution, and is never, except under peculiar circumstances, entitled to the same consideration as testimony which had been given in the District Court. *Taylor v. Harwood*, Taney's Dec. 438.

Admiralty. Stipulation.

1. (Jan., 1828.) *Consent.* The paper in nature of a stipulation is a mere substitute for the process of the court; and cannot, we think, be resorted to, where the process itself could not be issued according to law. The process could not issue legally in this case, because it would be the exercise of original jurisdiction in admiralty, which the Circuit Court does not possess. *Governor of Georgia v. Madrazo*, 1 Pet. 121.

2. (Oct., 1877.) Where a stipulation to abide and answer the decree of a District Court, in a case in admiralty, is, with the consent of the parties, substituted for the stipulation previously filed by a claimant, it thereby becomes the only stipulation for value, and does not become inoperative upon an appeal to the

Circuit Court. The appeal carries up the whole fund. *The Lady Pike*, 6 Otto, 461.

3. (May, 1814.) Prize goods are never delivered on bail until after a hearing; and a contrary practice is a great irregularity. Nor is a claimant ever entitled to a delivery on bail, even after a hearing, unless he show a *prima facie* legal title to the property. If he claim by an illegal act, he is not entitled to a delivery on bail. *The Diana*, 2 Gall. 93.

4. It seems, that if a delivery on bail has been allowed by the District Court in a gross case of illegality, the appellate court will not hold itself bound by the transaction, but direct the claimant to account for the whole proceeds on oath. *Ib.*

5. (Sept., 1857.) Where, in a suit *in rem* against a vessel, she was discharged on the usual stipulation for value, and afterwards, during the pendency of the case in this court, on appeal, the respective proctors consented in writing to a return of the vessel into the custody of the marshal, and to her sale by that officer, and she was sold, and an order was obtained from the circuit judge, directing the clerk to enter an order according to such consent, — *Held*, on a motion made to vacate such order, by a person who claimed to have an interest in the vessel, and who was not a party to the suit, that the judge had no jurisdiction or power to make the order. *The White Squall*, 4 Blatchf. 103.

6. The court has no power to order back into the custody of the marshal a vessel which has been fairly discharged from arrest on a stipulation. *Ib.*

7. The case of *The Union* (*ante*, p. 90) cited and approved. *Ib.*

8. (April, 1873.) A suit in admiralty, *in personam*, appealed to the Circuit Court for the District of Massachusetts, from the District Court for that district, was transferred to this court, under the eighth section of the act of Feb. 28, 1839 (5 Stat. at Large, 322). This court ordered that the decree of the District Court, which was for the libellant, should be carried into effect, unless the respondent should give a stipulation, with two sureties, to pay the damages and costs. Thereupon, a paper was filed in this court, signed by a United States commissioner for the District of Massachusetts, certifying that the respondent, and L. and D., as sureties, appeared before him and bound themselves that the respondent should pay damages and costs, or that execution should issue against them. The paper was signed

by no one but the commissioner, and bore date prior to May 8, 1872, when Rule 5 in Admiralty, of the Supreme Court, was amended. This court affirmed the decree below, and its decree was, on appeal, affirmed by the Supreme Court. On the mandate of the latter court, this court entered a summary judgment, *ex parte*, against L. and D., under which the body of L. was taken in execution. L. then moved this court to set aside the judgment and execution. *Held*, —

(1.) That the commissioner in Massachusetts was not authorized to authenticate the stipulation by such a certificate, and, therefore, that this court had no evidence that L. entered into the stipulation.

(2.) That L. was no party to the appeal to the Supreme Court.

(3.) That he was entitled to apply, by motion, for relief.

(4.) That the summary judgment and the execution against L. must be set aside as unwarranted. *Sawyer v. Oakman*, 11 Blatchf. 65.

9. (Feb., 1876.) On a libel *in rem*, in the District Court, against a vessel, the vessel was there discharged on a stipulation for value. The libel was dismissed, and an appeal was taken by the libellant to this court. Thereafter the stipulators for value became insolvent, and the libellant moved in this court that the claimant file new security for value. *Held*, that the motion must be granted, and that the court had the power to require the claimant to furnish new stipulators, and to enforce such requirement. *The Virgo*, 13 Blatchf. 255.

10. The effect of the appeal was to leave the libellant with the same rights in respect to stipulators as if no decree had been rendered. *Ib.*

11. The absence from the general admiralty rules of the Supreme Court, and from the rules of this court, of any provision for the case of insolvent stipulators in actions *in rem*, furnishes no reason for not affording the relief sought. *Ib.*

12. Part of the obligation which a claimant in an action *in rem* assumes when he receives at the hands of the court property in its custody, by substituting therefor personal security, by way of stipulation for value, is to maintain his stipulation good in the matter of the sureties. *Ib.*

13. (Dec., 1877.) In a suit *in rem* against a vessel, brought

in the District Court, the vessel was discharged from custody in that court, on a stipulation for value. On appeal, a decree was rendered by the Circuit Court for the libellant, with a direction that the two stipulators for value pay into that court the amount of such stipulation. One of the stipulators having died, the libellant applied for the entry of a summary judgment against the other stipulator, for the amount of the decree, and for execution against him. It was objected, that the libellant had not exhausted his remedy against the claimant of the vessel, and that the death of the one stipulator defeated the right of the libellant to execution against the survivor. *Held*, that the application must be granted. *The C. F. Ackerman*, 14 Blatchf. 360.

Admiralty. Change of Venue.

1. (Oct., 1852.) When both the judges of the Circuit Court are incompetent, from interest, or having been of counsel, to sit in a cause, it is to be certified to the nearest Circuit Court in this circuit [Massachusetts], competent in point of law to try the same. *Richardson v. Boston*, 1 Curt. C. C. 250.

2. In cases of admiralty appeals and writs of error, from the District Court, if the judge of the Supreme Court assigned to this circuit cannot sit for either of the above reasons, the case must be certified to the nearest Circuit Court in the second circuit. *Id.*

Admiralty. Death of a Party.

1. (Sept., 1872.) A libel was filed in the District Court against a vessel. D. appeared, and filed a claim to the vessel, as owner, and with E. and M., as sureties, gave a bond for the value of the vessel, and she was released. D. answered the libel, putting in a defense. Afterwards, and before the trial, D. died. No notice was taken of his death. The trial was had, counsel appearing for D. A final decree was rendered against the vessel, and a summary judgment against D., E., and M. An appeal to this court was taken on behalf of D., the sureties on the bond for a stay being E. and M. The District Court was not advised of the death of D., although his proctors knew of it. No letters of administration on the estate of D. were taken out until after such final decree was entered. On the trial in this court counsel

appeared for D. as appellant, and urged, as ground for a reversal of the decree, that by the death of D. the suit abated, and the decree against him was erroneous. *Held*, that the suit did not abate by the death of D. *The James Wright*, 10 Blatchf. 160.

2. Whether the appeal was properly taken in the name of D., after his death, *quære*. *Ib*.

3. This court, in decreeing on the merits for the appellee, ordered that the death of D. be suggested, and that the judgment be against E. and M. *Ib*.

Waiver. Admiralty.

1. (May, 1855.) Whether the District Court can entertain a libel of review, *quære*. But the appellee in whose favor both the original decree and the decree in review was made cannot raise the question here. *The Enterprise*, 2 Curt. C. C. 317.

2. (March, 1870.) In a suit in admiralty, *in personam*, for alleged advances to respondent's vessel in a port of distress, the District Court, before making a decree establishing the libellant's right to recover, and before any hearing of the cause, made an order, referring it to a commissioner to ascertain and report the amount due to the libellant. He reported such amount and the proofs he had taken. No objection was taken by the respondent, before the commissioner, to the allowance made; no exceptions were filed in the District Court to his report, and it did not appear that any objection was made in that court to such allowance. *Held*, that the respondent could not, on appeal, object to items of allowance, in respect to which it did not appear that objections had been raised in the District Court. *Harris v. Wheeler*, 8 Blatchf. 1.

3. (Nov., 1876.) It is too late to object to an appeal, where both parties have treated it as valid. *The Native*, 14 Blatchf. 34.

4. (April, 1876.) Where, on a libel *in rem*, to recover for repairs to a steamer, the jurisdiction of the District Court was submitted to, and the cause tried on its merits; after appeal to the Circuit Court, the claimants could not, for the first time, set up that the repairs were made in the home port of the steamer, and therefore did not create a maritime lien, no such fact being averred in the pleadings or shown by the evidence. *Meagher v. Steamboat Lizzie*, 2 Woods, 243.

Trial Admiralty Appeal.

1. (Oct., 1873.) An appeal in admiralty, from the District to the Circuit Court, in effect vacates the decree of the District Court; and a new trial in all respects, and a new decree, are to be had in the Circuit Court. The latter must execute its own decree; and the District Court has nothing more to do with the case. *The Lucille*, 19 Wall. 73.

2. (Oct., 1873.) It is error, and ground of reversal, for a Circuit Court to affirm a decree in admiralty of the District Court, and at the same time dismiss the appeal. *The Lottawanna*, 20 Wall. 201.

3. (Oct., 1870.) The rules of the Supreme Court provide that the testimony given in the District Court may be taken down by the clerk and transmitted to the Circuit Court, or it may be retaken by deposition; and the fiftieth rule provides that further proof may be taken in the Circuit Court. This shows that the facts, as well as the law, are open to revision in the Circuit Court. *Ayer v. Steamer Glaucus*, 4 Cliff. 166.

4. (Nov., 1870.) In the admiralty, an appeal supersedes altogether the decree of the court below, and the case is to be tried in the appellate court as if no decree had been passed in the court from which the appeal is taken. *Steamer Saratoga v. 438 Bales of Cotton*, 1 Woods, 75.

Finding. Admiralty.**ACT OF FEB. 16, 1875.**

SEC. 1. That the Circuit Courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately.

And in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law.

And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law. [*Supplement to Rev. Stat., page 135.*]

1. (July, 1877.) Where the amount involved in an admiralty suit is not sufficient to permit a review by the Supreme Court of the judgment of the Circuit Court, a general finding of facts and law by the latter court is sufficient, under the act of Feb. 16, 1875 (18 Stat. at Large, 315, s. 1.) *1,265 Vitriified Pipes, &c.*, 14 Blatchf. 274.

Bill of Exceptions. Admiralty.

1. (Sept., 1880.) On an appeal in admiralty, this court filed findings of fact and conclusions of law, and afterwards a final decree was entered, dismissing the libel. The libellant did not take or file any exceptions until more than a year afterwards, and then filed a paper containing exceptions to refusals of the court to find certain facts as proved, and an exception to the finding of a fact found, and exceptions to conclusions of law found. Afterwards, the libellant asked to have signed by the court a bill of exceptions representing that said exceptions were filed before the final decree was made. *Held*, that no bill of exceptions could be signed, because no exceptions were taken before the final decree was entered. *The Havre*, 18 Blatchf. 319.

Rule to return Money. Admiralty.

1. (Oct., 1817.) Where money had been paid by an order of the District Court, under an erroneous construction of an act of Congress, before a final order of the Circuit Court in which the suit for the same was pending, the Circuit Court granted a rule on the person who had received the money, to return it. *The Ariadne*, Pet. C. C. 455.

Rehearing. Admiralty.

1. (May, 1815.) The Circuit Court cannot rehear a cause, or admit a claim, at a term subsequent to that in which the cause was finally decided. *The Avery*, 2 Gall. 386.

2. (April, 1874.) A collision occurred between two vessels, the M. and the E. The libellants, as owners of the M., brought this suit, *in personam*, in the District Court for this district [Eastern District of New York], against the owners of the E., to recover for damages caused by such collision, claiming \$2,100. The owners of the E. sued the M., *in rem*, in the District Court for the Southern District of New York, claiming to recover \$3,489.37, as damages caused by the collision. Both suits were tried together, on the same proofs, before the same judge, in the District Court. In this suit, the libellants had a decree for \$1,695.92. The libel in the other suit was dismissed. The owners of the E. appealed to the Circuit Court in each suit. The decree in the suit in the southern district was directed to be affirmed in November, 1870, and the formal decree of affirmation was entered in February, 1871. In the latter month the owners of the E. appealed from that decree to the Supreme Court. In November, 1871, the appeal in this suit was heard by the Circuit Court, and on the 8th of March, 1872, the libellants had a decree therein, in this court, for \$1,292.81. In the latter month, the owners of the E. appealed from that decree to the Supreme Court. That court dismissed the appeal for want of jurisdiction. Afterwards, that court, on the merits, reversed the decree of the Circuit Court for the Southern District, dismissing the libel in the suit in that district. The respondents in this suit, in June, 1873, moved this court for a rehearing of this suit. *Held*, that the motion must be denied. *Petty v. Merrill*, 12 Blatchf. 11.

Interest. Admiralty.

1. (Nov., 1874.) Interest is not allowed in admiralty, unless specially directed; but this rule, so far as it governs the construction of the decrees of the Supreme Court, only applies to cases where the decree of the court below in favor of libellant is affirmed. When such decree is reversed and the case remanded, the Circuit Court may allow interest, unless expressly forbidden to do so by the decree of the Supreme Court. *The Grapeshot*, 2 Woods, 43.

Costs. Admiralty.

1. (May, 1816.) Costs when allowed in prize causes. *The Ulpiano*, 1 Mason, 91.

2. (Oct., 1853.) On an appeal in admiralty to this court from the District Court, where the cause is heard on proofs and decided, one docket fee of \$20 to the proctor, and only one, is taxable under the act of Feb. 26, 1853 (10 Stat. at Large, 161, s. 1), although the cause may have been upon the calendar of this court at more than one term. *Dedekam v. Vose*, 3 Blatchf. 77.

3. Where, in such a case, a deposition was taken and used in the District Court, and then read in this court from the apostles, a fee of \$2.50 for reading the deposition in this court is not taxable under the first section of that act. Such fee is taxable only on a new deposition taken in this court. *Ib.*

4. Where the appeal was taken, and the cause removed into this court, prior to the passage of that act, the item of \$5 on the removal of the cause to this court is not taxable under the first section of that act. *Ib.*

5. (Oct. 1853.) A docket fee of \$20 to the proctor is taxable under the first section of the act of Feb. 26, 1853 (10 Stat. at Large, 161), on a final disposition by the court of a cause on the calendar. *Hayford v. Griffith*, 3 Blatchf. 79.

6. So held, in a case where an appeal in admiralty was dismissed with costs for irregularity, without being heard. *Ib.*

7. (Dec., 1853.) Every item of costs taxable against a party to a suit in this court is specified in the fee-bill contained in the act of Feb. 26, 1853 (10 Stat. at Large, 161). *Dedekam v. Vose*, 3 Blatchf. 153.

8. The \$20 docket fee allowed to a proctor or attorney by that act can be taxed only on a final hearing, and can be taxed but once in a cause. *Ib.*

9. That fee is not taxable after a decree on an appeal in admiralty, on a motion that the stipulators on the appeal pay into court the amount of their stipulations. *Ib.*

10. A general objection to the aggregate of charges for clerk's fees and affidavits cannot be noticed on an appeal from the taxation of costs. The objections, and the items composing the charges, must be specified. *Ib.*

11. (Nov., 1860.) Where the District Court dismissed a libel

for want of jurisdiction, and awarded costs against the libellant, and this court, on an appeal of the libellant from the whole decree, affirmed so much of it as dismissed the libel, and reversed so much of it as awarded costs, no costs of this court were allowed to either party. *The McDonald*, 4 Blatchf. 477.

12. (Oct., 1852.) In a case of "transparent contrivance," proved by an intervenor upon evidence in this court, which was not before the court below, the libel was dismissed with costs to the intervenors and consignees, against the libellant and the contriving defendant, contrary to the rule established in *Carri-gan v. The Charles Pitman* (1 Wall. Jr. 307), which does not allow costs on a judgment of reversal in this court, obtained upon new evidence not had in the court below. *Gonzales v. Minor*, 2 Wall. Jr. 348.

13. (April, 1838.) In all cases in the Supreme Court, where the appeal is dismissed for want of jurisdiction, the court gives no costs; and that being the rule in the Supreme Court, it is proper that the Circuit Court should adopt the same rule in analogous cases. *Agnew v. Dorman*, Taney's Dec. 386.

14. (April, 1878.) The allowance or non-allowance of costs in an admiralty cause, being a matter within the discretion of the court, is not a subject of appeal. *Taylor v. Woods*, 3 Woods, 146.

Prize. Distribution. Admiralty.

1. (May, 1814.) A court of prize will take cognizance, not only of all questions of prize, but of every incident thereto, until a final adjustment of all claims arising from the capture. It will therefore entertain a supplemental suit for the distribution of prize proceeds. *The St. Lawrence*, 2 Gall. 19.

2. Where the proceeds have been paid to prize agents, and the cause is no longer pending, the proper jurisdiction is the District Court. Where the proceeds remain in the Circuit Court, application may be originally made there, to compel distribution. *Ib.*

3. The Prize Act of 27th January, 1813, ch. 155, authorizing the marshal to make distribution, does not narrow this jurisdiction. He still acts subject to the control of the prize court. *Ib.*

Decree. Admiralty.

1. (Oct., 1874.) A decree of the Circuit Court, affirming, on appeal, a decree of the District Court, which had charged a respondent in admiralty with the payment of a sum of money specified, and decreeing that the appellee in the Circuit Court should recover it; and decreeing further, that unless an appeal should be taken from the said decree of the Circuit Court to the Supreme Court, within the time limited by law, a summary judgment should be entered therefor against the stipulators on their stipulations given on appeal from the District Court, is, as to the stipulators, a provisional decree only, and one which, on appeal to the Supreme Court, becomes inoperative. *Ex parte Sawyer*, 21 Wall. 235.

2. Accordingly, though such an appeal be taken from the decree of the Circuit Court, and the decree of that court be affirmed, and the cause remanded, with instructions to the effect "that such execution and proceedings be had in said cause as, according to right and justice and the laws of the United States, ought to be had," &c., the Circuit Court does not lose its power over its previous order as to summary judgment against the stipulators. *Ib.*

3. And if, on a review of that order, the Circuit Court, from any reason, think proper to refuse to order execution against the stipulators, this court will not compel it by *mandamus* to order it. Under such a mandate as that above described the Circuit Court must itself decide whether execution shall issue against the sureties. *Ib.*

4. (Oct., 1875.) The writ of error vested the Circuit Court with complete jurisdiction; and that court having reversed the second decree of the District Court dismissing the libel, and adjudged that the first decree condemning the property should remain in full force, might "proceed to pass such decree as should have been passed" by the subordinate court; and, if a decree confirming the sale of the property was necessary, it was entirely competent for the Circuit Court to pass it. *Semmes v. United States*, 1 Otto, 21.

5. (May, 1816.) Damages decreed for the amount of goods taken out of a prize captured after the treaty of peace of 1815. *The Ulpiano*, 1 Mason, 91.

6. (May, 1833.) On appeal in salvage cases, the court of appeal does not alter the amount of salvage upon slight grounds, or inconsiderable differences of opinion. *Schooner Boston*, 1 Sumn. 329.

7. (Sept., 1845.) On an appeal to the Circuit Court, in admiralty, the whole decree of the District Court is brought up, although only part of it is appealed from. *The Roarer*, 1 Blatchf. 1.

8. In such a case, after a decision on the appeal by this court, it must execute the decree, and has no power to remit the proceedings to the District Court. *Ib.*

9. Where a part only of a decree of the District Court was appealed from, and as to that part this court reversed the decree of the District Court, — *Held*, that it was unnecessary for this court to affirm in terms the decree of the District Court, so far as it was not appealed from, but that the part not reversed remained in this court in full force, to be executed here, and became a part of the decree, as modified by this court on the appeal. *Ib.*

10. (Sept., 1857.) In this case [libel *in personam*], which was a suit for freight-money on the charter of a vessel, the court held that the master of the vessel wrongfully refused to permit her to be laden in accordance with the charter-party, and that the damage sustained by the charterer on account of such non-compliance with the charter-party ought to be deducted from the freight. *Parsons v. Ogden*, 4 Blatchf. 99.

11. But to save expense and prevent delay, the court, instead of sending the case to the clerk, to take proof as to such damage, made the deduction itself, and modified the decree below to that extent. *Ib.*

12. No costs were allowed to either party on the appeal. *Ib.*

13. (Sept., 1872.) The commissioner's report as to the value of the lost vessel, not disturbed, where there was conflicting evidence. *The James A. Wright*, 10 Blatchf. 161.

14. (June, 1878.) Where a libellant in admiralty, in a case of collision, has a decree in the District Court for a specified amount, with costs, and, on appeal, this court decrees for the libellant, the proper decree in this court is not a decree for the amount awarded below, including the costs there, with interest from the date of the decree below, nor is interest to be added to the amount reported by the commissioner below, from the date of his report, but the decree is to be for the amount of the loss at the

time of the loss, with interest from the time of the loss, and for the costs in the District Court, without interest on such costs. *Deems v. The Albany & Canal Line*, 14 Blatchf. 475.

15. (March, 1879.) Cross-libels were filed in the District Court, in admiralty, for a collision, one being a suit *in personam*, and the other a suit *in rem*. In the first suit the District Court decreed damages and costs against the respondent. In the second suit, that court dismissed the libel with costs. The respondent in the first suit appealed, and the libellant in the second suit appealed. This court, on the appeals, apportioned the damages sustained by the respective parties. One of the vessels was totally lost by the collision. The aggregate costs of both parties in this court and in the District Court were divided by this court equally between the parties. *Vanderbilt v. Reynolds*, 16 Blatchf. 80.

16. (Nov., 1870.) Where the libellant claimed \$27,000, and got a decree for \$900 in the District Court, and appealed, the Circuit Court being of opinion that the libellant ought to recover nothing, could dismiss the libel at libellant's costs, although no appeal had been taken by claimant from the decree of the District Court. *Steamer Saratoga v. 438 Bales of Cotton*, 1 Woods, 75.

17. (Nov., 1874.) When the Supreme Court reversed a decree in admiralty, and remanded the cause to the Circuit Court, with instructions to render a decree against the ship for the amount found due for supplies and repairs actually furnished and really necessary, and the supplies and repairs were furnished upon a bottomry bond which entitled the libellants to a premium of nineteen and a half per cent for the voyage, — *Held*, that such premium should be included in the amount to be decreed by the Circuit Court. *The Grapeshot*, 2 Woods, 42.

Judgment on Appeal Bond. Admiralty.

1. (Oct., 1879.) Where, in a suit *in rem*, in admiralty, in the District Court, the claimant, after a decree for the libellant, appeals to this court, and this court decrees for the libellant for a sum sufficient to allow of an appeal by the claimant to the Supreme Court, which may be a *supersedeas*, no summary judgment can be rendered by this court against the sureties in the appeal bond executed on the appeal to this court, until after the

expiration of ten days after the rendering of the decree by this court. *The New Orleans*, 17 Blatchf. 216.

2. (Oct., 1879.) Where, in a suit *in rem*, in admiralty, in the District Court, the libellant, after a decree dismissing the libel, appeals to this court, and this court dismisses the libel, and the sum claimed in the libel is sufficient to allow of an appeal by the libellant to the Supreme Court, which may be a *supersedeas*, no summary judgment can be rendered by this court against the sureties in the appeal bond executed on the appeal to this court, until after the expiration of ten days after the rendering of the decree by this court. *The Jesse Williamson, Jr.*, 17 Blatchf. 220.

3. (Oct., 1879.) Where, in a suit *in rem*, in admiralty, in the District Court, the claimant, after a decree for the libellant, appeals to this court, and this court decrees for the libellant for a sum not sufficient to allow of an appeal by the claimant to the Supreme Court, a summary judgment can be rendered at once by this court against the sureties in the appeal bond executed on the appeal to this court. *The Blanche Page*, 17-Blatchf. 221.

Execution. Admiralty.

1. (Dec., 1870.) The respondent, in a suit in admiralty, appealed to this court from the decree of the District Court in favor of the libellant, and an order was entered in this court affirming the decree of the District Court, with costs. *Held*, that no execution could issue in this court until the entry of a formal decree awarding a recovery to the libellant. *Harris v. Wheeler*, 8 Blatchf. 81.

2. (Oct., 1872.) A libellant, in a suit in admiralty, had a decree against two vessels for damages, which contained no provision for an apportionment of the damages between the two vessels, or otherwise settling the equities between their claimants. After decree, it being shown that the claimant of one vessel and his sureties stood in the relation of sureties for the claimant of the other vessel and his sureties, and that the latter had assumed the litigation, and agreed to indemnify the former, the court, on the application of the former, made an order that the libellant first issue execution against the latter, and that proceedings against the former be stayed until the return of such execution. *The Helen R. Cooper*, 10 Blatchf. 212.

3. (Feb., 1879.) The abolition of imprisonment for debt in New York makes it impossible for the Circuit Court of the United States, in New York, to use imprisonment as a remedy in execution of a judgment, or requiring the payment of money due on stipulations or appeal bonds. *The Blanche Page*, 16 Blatchf. 1.

Admiralty. Appeal to Supreme Court.

1. (June, 1815.) In case of an appeal, I shall direct all the original papers to be delivered to the captors, upon their undertaking to deliver them to the Supreme Court, and leaving attested copies in the Circuit Court. It is impossible, without an inspection, to feel the full force of some portion of the difficulties of this cause. *The Francis*, 2 Gall. 397.

2. (May, 1833.) Since the act of March, 1803, ch. 93, in admiralty, as well as equity cases, carried up to the Supreme Court by appeal, all the evidence goes with the case, and it must accordingly be in writing. *Schooner Boston*, 1 Sumn. 328.

3. (Jan., 1868.) After an appeal has been duly taken from the decree of this court to the Supreme Court, by the claimant in an admiralty suit, *in rem*, this court will not, on the application of the claimant, under the twelfth rule of the Supreme Court, order that a commission issue to examine witnesses who are named, so that their depositions may be made available to the claimant on the appeal, although he has prayed in his petition of appeal that the cause may be tried anew in the Supreme Court, as well upon the proceedings and evidence in the courts below, as upon such further depositions and evidence as the claimant may present to the Supreme Court. *The Ocean Queen*, 6 Blatchf. 24.

4. The twelfth rule of the Supreme Court explained. *Ib.*

5. Under that rule, it is for the Supreme Court to decide, on a motion to be made to it, whether the evidence sought to be taken will be admissible in the case, before a commission can be issued by this court. *Ib.*

Admiralty. Appeal to Circuit Court.*Copies of Proofs and Entries certified to Appellate Court.*

REVISED STATUTES.

SEC. 632. In case of an appeal, as provided by the preceding section, copies of the proofs, and of such entries and papers on file as may be necessary on hearing of an appeal, may be certified up to the appellate court.

26 Feb., 1853, c. 80, s. 1, v. 10, p. 163.

1. (Oct., 1815.) After an appeal, the court may allow evidence, not received in season to be made a part of the case, to be put upon the record *de bene esse*, with a memorandum of the fact. *London Packet*, 1 Mason, 14.

2. (May, 1855.) The practice of bringing admiralty cases into this court by appeal, without the evidence, upon the facts found by the District Court, disapproved. *Gloucester Insurance Co. v. Younger*, 2 Curt. C. C. 322.

3. (Nov., 1862.) Where such a case [a seizure case] is, by agreement of parties, tried by the District Court without a jury, the record should be made up in form, as in the case of a writ of error, with the proper exceptions to the admission or rejection of testimony, or to the instructions of the court to the jury. *United States v. Fifteen Hhds. Brandy*, 5 Blatchf. 106.

4. (Feb., 1872.) In cases of appeal from the Consular and Ministerial Courts of China and Japan to the Circuit Court of the United States for the District of California, the record on appeal must show an allowance of the appeal. *Steamer Spark v. Lee Choi Chum*, 1 Sawyer, 713.

**Appeal from District Court of California, under Act of
July 1, 1864. Land Titles.**

1. (May, 1865.) The act of Congress of July 1, 1864, "to expedite the settlement of titles to lands in the State of California," did not authorize appeals to the Circuit Court from all past decrees in land cases of the District Court, but only from decrees of that court then appealable to the Supreme Court, but from which no appeal had been taken, and from decrees of the

District Court which might be subsequently rendered. *Mesa v. United States*, 4 Sawyer, 551.

Appeal from Consular Court of Japan. Record. Allowance of Appeal. Citation.

1. (Feb., 1878.) The record on an appeal from the Consular Court of Japan to the Circuit Court for the District of California, consists of a transcript of the libel, bill, answer, depositions, and all other proceedings in the case. *Tazaymon v. Twombly*, 5 Sawyer, 79.

2. The transcript should be a single document certified at the end, as being a full and correct copy of the proceedings in the case, and authenticated by the official signature and seal of the consul. *Ib.*

3. Where, on appeal from a Consular Court of Japan, the record sent up consisted of a mass of loose, separate papers, some having the appearance of being originals, and others of being copies not certified, or in any manner authenticated, the appellate court declined to take jurisdiction, and dismissed the appeal. *Ib.*

4. In cases of appeal from the Consular and Ministerial Courts of China and Japan, to the Circuit Court of the United States for the District of California, the record on appeal must show an allowance of the appeal. *Ib.*

5. A citation is necessary, unless the appeal is allowed in open court. *Quære*, Whether a citation is not always necessary, if the Consular Court has once adjourned after rendering a decree, there being no terms of such court. *Ib.*

Writ of Error to Judgments of District Courts.

REVISED STATUTES.

SEC. 633. Final judgments of a District Court in civil actions, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined and reversed or affirmed in a Circuit Court, holden in the same district, upon a writ of error.

24 Sept., 1789, c. 20, s. 22, v. 1, p. 84.

ACT OF MARCH 3, 1879.

SEC. 1. The Circuit Court for each judicial district shall have jurisdiction of writs of error in all criminal cases tried before the District Court where the sentence is imprisonment or fine and imprisonment, or where, if a fine only, the fine shall exceed the sum of three hundred dollars; and in such case a respondent feeling himself aggrieved by a decision of a District Court, may except to the opinion of the court, and tender his bill of exceptions, which shall be settled and allowed according to the truth, and signed by the judge, and it shall be a part of the record of the case.

SEC. 2. Within one year next after the end of the term at which such sentence shall be pronounced, and not after, the respondent may petition for a writ of error from the judgment of the District Court in the cases named in the preceding section, which petition shall be presented to the circuit judge or circuit justice in term or vacation, who, on consideration of the importance and difficulty of the questions presented in the record, may allow such writ of error, and may order that such writ shall operate as a stay of proceedings under the sentence; but the allowance of such writ shall not so operate without such order.

The judge or justice allowing such writ of error shall take a bond with sufficient sureties that the same shall be prosecuted to effect, and that the respondent shall abide the judgment of the Circuit Court thereon.

And if the writ shall be allowed to operate as a stay of proceedings under the sentence, bail may in like manner be taken for the appearance of the respondent at the term of the Circuit Court to which such writ of error shall be returnable, and that he will not depart without leave of court.

SEC. 3. Such writ of error so allowed shall be returnable to the next regular term of the Circuit Court for the district, and shall be served on the district attorney of the United States for such district.

The Circuit Court may advance all such writs of error on its docket in order that speedy justice may be done.

And in case of an affirmance of the judgment of the District Court, the Circuit Court shall proceed to pronounce final sentence and to award execution thereon; but if such judgment shall be reversed, the Circuit Court may proceed with the trial of said cause *de novo*, or remand the same to the District Court for further proceedings. [*Supplement to Rev. Stat.*, page 451.]

1. (Feb., 1817.) A Circuit Court has no authority to issue a *certiorari*, or other compulsory process, to the District Court, for

the removal of a cause from that jurisdiction, before a final judgment or decree is pronounced. *Patterson v. United States*, 2 Wheat. 221, 222.

2. (May, 1812.) No appeal lies from the District Court to the Circuit Court in any causes, except civil causes of admiralty and maritime jurisdiction. Therefore, in debt for a penalty, tried in the District Court, no appeal lies. *United States v. Wonson*, 1 Gall. 4.

3. Where a cause has once been tried by a jury in the District Court, there cannot, even supposing an appeal lay, be a new trial by a jury at the Circuit Court. *Ib.*

4. (May, 1816.) Upon a writ of error, if the verdict below was given upon an immaterial issue, a repleader cannot be awarded; but judgment must be rendered against the party who committed the first fault, if there be sufficient matter on which to found such judgment. *United States v. Burnham*, 1 Mason, 57.

5. (Oct., 1816.) The proceedings under the tenth section of the Patent Act of Feb. 21, 1793, ch. 11, are in the nature of a *scire facias* at the common law to repeal a patent. Upon a judgment rendered on such a suit, error lies to the Circuit Court. *Stearns v. Barrett*, 1 Mason, 153.

6. (May, 1819.) The issue of *nul tiel record* is an issue of *fact*, and, as such, no writ of error lies from the judgment of the District Court, on that fact, to the Circuit Court, under the Judiciary Act of Sept. 24, 1789, ch. 20, s. 22. *United States v. Cook*, 2 Mason, 22.

7. (Oct., 1859.) A writ of error *coram vobis* does not lie in the Circuit Court in a criminal case, either from its own judgment or the judgment of the District Court. *United States v. Plumer*, 3 Cliff. 28.

8. Being without any common-law authority to try or punish offenders, except for contempt, they cannot exercise any power in a criminal case not derived expressly or impliedly from an act of Congress. *Ib.*

9. No authority has been given in the acts of Congress to the Circuit Court to re-examine, by writ of error, or in any other manner, the rulings or judgments of the District Court in criminal cases. No such authority is given by the fourteenth section of the Judiciary Act. *Ib.*

10. By that section, Congress only intended to vest the power

to issue such other writs in cases where jurisdiction already existed, and not where the jurisdiction was to be acquired by means of the writ to be issued. *Ib.*

11. If the alleged error be in the judgment itself, and not in the process, a writ of error does not lie in the same court to correct it. *Ib.*

12. (Nov., 1862.) A seizure case, triable by a jury in the District Court, cannot be reviewed in this court on an appeal, but can be reviewed only on a writ of error. *United States v. Fifteen Hhds. Brandy*, 5 Blatchf. 106.

13. (June, 1871.) This court has jurisdiction to review a judgment or decree of distribution made by the District Court, among various claimants of the informer's share in a forfeiture, after condemnation and sale of the forfeited property, and the claimants are, in such sense, parties to the proceeding, that they may invoke the exercise of that jurisdiction. *Wheaton v. United States*, 8 Blatchf. 474.

14. Whether the mode of review in the case of property seized on land as forfeited under the internal revenue laws is by appeal or by writ of error, *quære*. *Ib.*

15. (Nov., 1872.) After the condemnation of property in the District Court, as forfeited to the United States, for a violation of the customs laws, W. and E. each claimed a share as informer. That court adjudged that neither was informer, but awarded a share to W., as seizing officer, under sec. 1 of the act of March 2, 1867 (14 Stat. at Large, 546). E. then sued out a writ of error from this court. *Held*, that, on such writ, the decision of the District Court that, as matter of fact, E. was not entitled to a share as informer, could not be reviewed. *United States v. 60½ Carats Brilliants*, 10 Blatchf. 221.

16. It was not an error in law for the District Court to so decide, although the commissioner who, by order of that court, took the proofs, reported them with his opinion in favor of E. *Ib.*

17. A writ of error to the District Court brings to the consideration of this court questions of law only. *Ib.*

18. (Feb., 1879.) *Held*, that the finding of facts by the referee [in the District Court, of a suit brought by an assignee in bankruptcy to recover the value of property transferred by the bankrupt, in fraud of the Bankrupt Act] could not be reviewed on writ of error. *Tyler v. Angevine*, 15 Blatchf. 536.

19. (July, 1879.) Whether an order of the District Court refusing a certificate of reasonable cause of seizure, under sec. 970 of the Revised Statutes, can be reversed by the Circuit Court, on writ of error, *quære*. *United States v. Frerichs*, 16 Blatchf. 547.

20. (Oct., 1822.) Debt on a post-office bond, against the sureties for \$1,000, the penalty, and no breaches laid. The jury found a special verdict. On error to the District Court, it was decided, that though from the papers in the record it appeared that less than \$50 was due, yet the penalty was the debt claimed, and therefore there was no objection to the jurisdiction. *Post-master-General v. Cross*, 4 Wash. 326.

21. (Nov., 1821.) An action of debt to recover a penalty is a "civil cause," within the meaning of the ninth section of the Judiciary Act, from which a writ of error lies from the District Court to the Circuit Court of the United States. *Jacob v. United States*, 1 Brock. 520.

22. (1874.) The manner in which the proceedings and judgments of the District Courts in actions at law must be revised and re-examined on error in the Circuit Court. *Blair v. Allen*, 3 Dill. 101.

Circuit Court in and for the Three Districts of Alabama.

REVISED STATUTES.

SEC. 634. The Circuit Court in and for the three districts of Alabama shall exercise appellate and revisory jurisdiction of the decrees and judgments of the District Courts for the said districts, under the laws conferring and regulating the jurisdiction, powers, and practice of Circuit Courts in cases removed into such courts by appeal or writ of error.

3 March, 1873, c. 223, s. 4, v. 17, p. 485.

22 June, 1874, c. 401, s. 5, v. 18, p. 195.

Writs of Error and Appeals within One Year.

REVISED STATUTES.

SEC. 635. No judgment, decree, or order of a District Court shall be reviewed by a Circuit Court, on writ of error or appeal, unless the writ of error is sued out, or the appeal is taken, within one year after the entry of such judgment, decree, or order: *Provided*, that where a party entitled to prosecute a writ of error or to take an appeal is an infant, or

non compos mentis, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within one year after the entry of the judgment, decree, or order, exclusive of the term of such disability. [See s. 1008.]

1 June, 1872, c. 255, s. 2, v. 17, p. 196.

Judgment or Decree on Review.

REVISED STATUTES.

SEC. 636. A Circuit Court may affirm, modify, or reverse any judgment, decree, or order of a District Court brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the District Court, as the justice of the case may require.

1 June, 1872, c. 255, s. 2, v. 17, p. 196.

1. (May, 1813.) Although an error appear on the record, yet, if in distinct pleadings, a complete bar is shown to the action, the judgment must be affirmed. *United States v. Carlton*, 1 Gall. 400.

2. (May, 1819.) Where the issue in the District Court is *null tiel record*, and the court below adjudge that the plaintiff has not produced the record, there can be no reversal of the judgment, unless the record, if any is produced, is contained in the record brought up on the writ of error to the Circuit Court. *United States v. Cook*, 2 Mason, 22.

3. (1870.) A judgment [of the District Court] will not be reversed because papers recognized on the trial in evidence were not *formally* read. *Andrews v. Graves*, 1 Dill. 108.

Jurisdiction of Cases transferred from District Courts on Account of Disability, &c.

REVISED STATUTES.

SEC. 637. When any cause, civil or criminal, of whatever nature, is removed into a Circuit Court, as provided by law, from a District Court, wherein the same is cognizable, on account of the disability of the judge of such District Court, or by reason of his being concerned in interest therein, or having been of counsel for either party, or being so related to or connected with either party to such cause as to render it improper, in his opinion, for him to sit on the trial thereof, such Circuit Court shall have the same cognizance of such cause, and in like

manner as the said District Court might have, or as said Circuit [Court] might have if the same had been originally and lawfully commenced therein ; and shall proceed to hear and determine the same accordingly. [See ss. 587, 601.]

2 March, 1809, c. 27, s. 1, v. 2, p. 534.

3 March, 1821, c. 51, v. 3, p. 643.

27 Feb., 1877, c. 69, v. 19, p. 241.

Courts always open for Certain Purposes.

REVISED STATUTES.

SEC. 638. The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any judge of a Circuit Court may, upon reasonable notice to the parties, make, and direct and award, at chambers, or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable, of course, according to the rules and practice of the court.

23 Aug., 1842, c. 188, s. 5, v. 5, p. 517.

22 Feb., 1875, c. 95, s. 4, v. 18, p. 333.

REMOVAL OF CAUSES FROM STATE COURTS.

REVISED STATUTES.

*Removal of Suits against Aliens, &c., where Amount exceeding \$500 in
Dispute.*

SEC. 639. Any suit commenced in any state court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed, for trial, into the Circuit Court, for the district where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section.

24 Sept., 1789, c. 20, s. 12, v. 1, p. 79.

27 July, 1866, c. 288, v. 14, p. 306.

2 March, 1867, c. 196, v. 14, p. 558.

3 March, 1875, c. 137, ss. 2, 7, 9, v. 18, pp. 471, 472, 473.

First. When the suit is against an alien, or is by a citizen of the state wherein it is brought, and against a citizen of another state, it may be removed on the petition of such defendant, filed in said state court at the time of entering his appearance in said state court.

Second. When the suit is against an alien and a citizen of the state wherein it is brought, or is by a citizen of such state against a citizen of the same and a citizen of another state, it may be removed, as against said alien or citizen of another state, upon the petition of such defendant, filed at any time before the trial or final hearing of the cause, if, so far as it relates to him, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause. But such removal shall not take away or prejudice the right of the plaintiff to proceed at the same time with the suit in the state court, as against the other defendants.

Third. When a suit is between a citizen of the state in which it is brought and a citizen of another state, it may be removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if, before or at the time of filing said petition, he makes and files in said state court an affidavit, stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court.

In order to such removal, the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said state court good and sufficient surety for his entering in such Circuit Court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the cause, or, in said cases where a citizen of the state in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein. It shall thereupon be the duty of the state court to accept the surety and to proceed no further in the cause against the petitioner, and any bail that may have been originally taken shall be discharged.

When the said copies are entered as aforesaid in the Circuit Court, the cause shall there proceed in the same manner as if it had been brought there by original process, and the copies of pleadings shall have the same force and effect, in every respect and for every purpose, as the original pleadings would have had by the laws and practice of the courts of such state, if the cause had remained in the state court.

ACT OF MARCH 3, 1875.

SEC. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district.

And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district. [*Supplement to Rev. Stat., page 174.*]

Removal. Suit of a Civil Nature, at Law or in Equity.

1. (Dec., 1855.) A statute of Arkansas directs that, where lands are sold by a sheriff, or other public officer, the purchaser is authorized to institute proceedings in a court, calling upon all persons to come in and show cause why the sale should not be confirmed.

Such a proceeding, when instituted in a state court and removed into the Circuit Court, conformably to the act of Congress, constitutes a case over which this court will take jurisdiction. *Parker v. Overman*, 18 How. 137.

2. (Dec., 1872.) Where a proceeding in a state court is merely incidental and auxiliary to an original action there, a graft upon it, and not an independent and separate litigation, it cannot be removed into the federal courts under the act of 2d of March, 1867, authorizing, under certain conditions, the transfer of "suits" originating in the state courts. *Bank v. Turnbull & Co.*, 16 Wall. 190.

3. (Oct., 1878.) A controversy of this kind in Minnesota [in taking land for public use], when carried under a law of the state from the commissioners of appraisalment to the state court,

taking there the form of a suit at law, may, if it is between citizens of different states, be removed to a federal court. *Boom Company v. Patterson*, 8 Otto, 403.

4. (Oct., 1878.) *Held*, that the causes relied on for the nullity of the judgment being, under the Code of Louisiana, vices of form, the proceeding by petition was substantially a continuation of the original suit, and that the Circuit Court could not take cognizance thereof. *Barrow v. Hunton*, 9 Otto, 80.

5. The character of cases sought to be removed to the courts of the United States is always open to examination, to determine whether, *ratione materiæ*, they are competent to take jurisdiction thereof. State rules on the subject cannot deprive them of it. *Ib.*

6. (Oct., 1879.) A receiver appointed by a state court, in a suit which, under the act of March 3, 1875 (18 Stat. pt. 3, p. 470), was subsequently removed to the Circuit Court of the United States, reported to the latter, stating the amount of the fund in his hands, and asking for an order to pay therefrom certain liabilities. *Held*, that the Circuit Court had authority to require him to account for the fund. . . . *Hinckley v. Railroad Co.*, 10 Otto, 153.

7. (Oct., 1880.) A sheriff, to whom was directed a *feri facias* sued out upon a judgment against A., levied the writ upon certain goods and chattels, for which replevin was brought in a state court against him by B., a non-resident of the state, claiming to be the owner of them. *Held*, that there is nothing in the character of the suit which precludes its removal by B. to the Circuit Court. *Kern v. Huidekoper*, 13 Otto, 485.

8. (Oct., 1880.) A suit instituted to try the title of a party to a state office, whereof he is the incumbent, and whereto he was, by the constituted authorities of the state, duly declared to be elected pursuant to her laws, cannot be removed from one of her courts into the Circuit Court of the United States on his petition, setting forth that, by reason of bribery and threats, colored persons who were qualified to vote at the election, and who would have voted for him, were deterred from voting, and that the returning board rejected the votes of the parishes where such illegal practices prevailed. *Dubuclet v. Louisiana*, 13 Otto, 550.

9. (Oct., 1880.) A township in Illinois and a taxpayer thereof, on behalf of himself and other resident taxpayers, filed

their bill in a court of that state against certain state, county, and township officers and the "unknown owners and holders" of certain township bonds, each payable in the sum of \$1,000. The bill prayed for an injunction to restrain the levy and collection of a tax to pay the principal of the bonds or any interest thereon. A., a citizen of another state, was the owner of all the bonds. *Held*, that he was entitled, under the act of March 3, 1875, ch. 137 (18 Stat. pt. 3, p. 470), to remove the suit to the Circuit Court of the United States. *Harter v. Kernochan*, 13 Otto, 562.

10. (Oct., 1868.) Where a suit at law was brought in a state court on a policy of reinsurance, and, while it was pending, the plaintiff brought a suit in equity in the same court against the defendant to reform the policy for mistake, and to prohibit the defendant from setting up, in defense, certain specified matters, and the defendant removed the suit in equity into this court, under the twelfth section of the act of Sept. 24, 1789 (1 Stat. at Large, 79), — *Held*, that the suit in equity was an original suit, and was properly removable under said section. *Charter Oak Fire Insurance Co. v. Star Insurance Co.*, 6 Blatchf. 208.

11. (Nov., 1875.) Where a citizen of one state filed a petition in a court of the state of which he was a citizen, against a citizen of another state, to restrain the execution of a judgment obtained in the state court by the latter against the former, such cause was removable to the federal court, under the act of March 3, 1875, notwithstanding the fact, that the federal courts were prohibited, by sec. 720 of the Revised Statutes, from granting an injunction to stay proceedings in a state court. *Watson v. Bondurant*, 2 Woods, 166.

12. (May, 1879.) A bill was filed in a state chancery court, by certain complainants, in behalf of themselves and other creditors, to assert and enforce a lien on certain railroad property which had been sold, and was in the possession of the purchasers. After final decree by which the lien was established, and while a reference to the master was pending to ascertain the amounts due the creditors who sought the benefit of the decree, the purchasers of the railroad property against which the lien had been declared, paid the complainants their claims in full, and bought up and settled other claims entitled to the benefit of the decree. Counsel for complainants received no compensation for their services in respect to these last-mentioned claims. They, therefore, filed

their petition in the state chancery court, entitled of the original cause, against the purchasers of the railroad property, in which they claimed a lien on said property for their fees in the original case, and prayed that the defendants to the petition might be served with notice thereof, and allowed to answer the same; that an account might be taken of what was due the petitioners for said services; that the defendants might be decreed to pay them for said services such sums as were just and equitable; that they might be declared to have a lien on said railroad property therefor; and if said sums were not paid, that the property might be sold to pay the same, and for general relief. *Held*, that this petition was not a mere graft upon, or appendage to, the original suit, but was, to all intents, a suit in equity; and as the case fulfilled all other requirements of the statute, it could be removed from the state to the federal court by virtue of the act of March 3, 1875, for the removal of causes. *Pettus & Dawson v. Railroad and Banking Co.*, 3 Woods, 620.

13. (April, 1853.) The fact that a suit is connected with, and grows out of, matters litigated in a state court, does not prevent this court from taking jurisdiction in the case, if otherwise within the twelfth section of the act of 1789, for the removal of cases from the state to United States courts. *Hatch v. Preston*, 1 Biss. 19.

14. (March, 1873.) The act of April 20, 1871, does not authorize the removal of a cause from the state court in every case in which the United States courts would have original jurisdiction. *Gaughan v. Northwestern Fertilizing Co.*, 3 Biss. 485.

15. Congress did not intend, by the general words used, to extend jurisdiction, and to authorize removal, except under the circumstances specified in the several acts. *Ib.*

16. Doubtful jurisdiction not entertained. *Ib.*

17. (Aug., 1875.) A proceeding under the right of eminent domain, to condemn land for a railroad, is not a case in which the state is a party, and the federal courts may have jurisdiction. Nor is it a special proceeding, nor can the right of removal be limited by state laws. It is in effect a suit of a civil nature, and, if the parties are competent, comes under the United States statutes for the removal of causes. *Warren v. Railroad Co.*, 6 Biss. 425.

18. (March, 1876.) The existence of a suit by stockholders of a railroad company, and even possession by trustees under the order of the state court therein, do not affect the right to remove

into the federal court a suit brought by bondholders under a deed of trust, which is paramount to the rights of the stockholders, and the possession must follow into the federal court. *Scott v. Railroad Co.*, 6 Biss. 529.

19. (1875.) A suit pending in a state court, between a landowner and an incorporated company, seeking to appropriate his private property under the right of eminent domain, where the question to be tried is the value of such land, is a suit of such a nature as may be removed to the federal court, although the proceeding in its inception was an appraisement by commissioners appointed under the charter of the company. *Patterson v. Boom Company*, 3 Dill. 465.

20. (1877.) A contest in regard to the distribution of the estate of a deceased person, where the amount involved is sufficient, and the citizenship of the parties is such as would confer jurisdiction, is a "controversy" that may be removed from the state to the federal courts, under the provisions of the act of Congress of March 3, 1875. *Craigie v. McArthur*, 4 Dill. 474.

21. (1877.) The statutes of Iowa allow an "occupying claimant," who is an unsuccessful defendant in an ejectment suit, the right to retain possession of the land after judgment against him, until the value of his improvements (if made under color of title, and in good faith) are ascertained, provided he files his petition therefor after judgment against him, but before the plaintiff causes the same to be executed, which petition must be filed in the main action. After judgment for plaintiff in the main action, the defendant, under the Iowa statutes, filed his petition in the suit as an "occupying claimant," to have the value of his improvements ascertained, &c.; whereupon the plaintiff in the main suit filed his petition, under the act of Congress of March 3, 1875, for the removal of the cause to the Circuit Court of the United States. *Held*, not removable, being a mere dependence upon the original suit. *Chapman v. Barger*, 4 Dill. 557.

22. (1879.) A motion, under the Missouri statute as to corporations, for execution against a stockholder cannot be removed to the federal court. It is not a "suit at law or in equity," within the meaning of these words as used in the statutes, giving the right of removal of causes from state to federal courts. *Webber v. Humphreys*, 5 Dill. 223.

23. (1879.) A proceeding by *mandamus* in the state court

under the statutes of Kansas (Gen. Stats. 1868, p. 766), to compel the defendant company to register the transfer of certificates of stock held by the plaintiff, is a "suit of a civil nature at law," within the meaning of the Removal Act of March 3, 1875, and, upon proper application, may be transferred to the Circuit Court of the United States. *Washington Improvement Co. v. Railway Co.*, 5 Dill. 489.

**Removal. Suits arising under the Constitution, Laws, or
Treaties of the United States.**

1. (Dec., 1869.) A marshal of the United States sued in a state court after the 2d of August, 1866, and convicted of a trespass in levying upon property not the defendant's in his writ, cannot remove the suit into the national courts, either under the act of April 9, 1866 (14 Stat. at Large, 27), or the act of March 3, 1863 (12 ib. 755), as a suit brought against him in a state court for a trespass made or committed during the rebellion, by authority derived from an act of Congress. *McKee v. Rains*, 10 Wall. 22.

2. (Oct., 1876.) The questions of title involved in this case do not arise under the Constitution or the laws of the United States, or a treaty made under its authority. The Circuit Court did not, therefore, err in remanding it to the state court, from which it had been removed. *Hoadley v. San Francisco*, 4 Otto, 4.

3. (Oct., 1877.) A suit cannot be removed, under the second section of the act of March 3, 1875 (18 Stat. 475), simply because, in its progress, a construction of the Constitution or a law of the United States may be necessary, unless it, in part at least, arises out of a controversy in regard to the operation and effect of some provision in that Constitution or law upon the facts involved. *Gold-Washing and Water Co. v. Keyes*, 6 Otto, 199.

4. (July, 1866.) When a case is so removed, the question whether the removal is in violation of the Constitution, and whether the case is one arising under the Constitution, &c., may be raised on the trial. *Murray v. Patrie*, 5 Blatchf. 343.

5. (May, 1878.) Under sec. 2 of the act of March 3, 1875 (18 Stat. at Large, 470), a civil suit brought in a state court, where the matter in dispute exceeds, exclusive of costs, \$500, and in which there is a controversy between citizens of different states, may be removed into the Circuit Court of the United

States, even though the case is not one arising under the Constitution, laws, or treaties of the United States. *Low v. Wayne Co. Savings Bank*, 14 Blatchf. 449.

6. (April, 1877.) A plaintiff who has a suit in a state court, in which there is a controversy between him and a citizen of the same state, touching the title to a tract of land, cannot remove the case to the federal court merely because he claims title under a sale made by the United States marshal upon a *fiery facias* issued from the federal court. *Gay v. Lyons*, 3 Woods, 56.

7. Such a case cannot be removed, unless the validity or effect of the judgment, or the proceedings and sale under which the plaintiff claims title, are brought in question. *Ib.*

8. (May, 1878.) Where, in an action of trespass brought in a state court, the defendant justifies the alleged trespass, under the authority of a court, and of the laws of the United States, the case is removable to the federal court, under sec. 2 of the act of March 3, 1875 (18 Stat. 470), as a case arising under the Constitution or laws of the United States. *Houser v. Clayton*, 3 Woods, 273.

9. Where such a case has been removed to the federal court, on the ground that it is one arising under the Constitution or laws of the United States, that court will confine the defendant substantially to the ground of defense which he indicated in his petition for removal. *Ib.*

10. (1870.) Where, in an action of trespass, the defendant pleaded, in substance, that civil war existed, that martial law was in force, and that the alleged trespasses were compulsory assessments made upon the plaintiff or his property by virtue of an order of the commanding general of the army in that department, — *Held*, that the facts pleaded brought the case within sec. 4, art. 11, of the Constitution of the State of Missouri, which in substance exempts persons from liability for acts done during the late civil war, by virtue of military authority, &c., under which they were a good defense to the action. *Clark v. Dick*, 1 Dill. 9.

11. The facts above mentioned, pleaded as a defense to the action, bring the case within the two years' limitation clause of the act of Congress of 1863 (12 Stat. 757), and this limitation is applicable to a case originating in a state court, and by virtue thereof properly removed into the federal court. *Ib.*

12. (1877.) To a bill filed in a state court to enforce a ven-

dor's lien, the defendant set up a sale of the land in question to him by the assignee in bankruptcy of one C., the maker of the notes constituting the lien, and filed his petition for the removal of the cause to the United States court. *Held*, that this involves the construction of the bankrupt law, and is therefore properly removable; and it does not alter the case, that there are other questions of law to be settled, which depend on general principles, and not on the laws of Congress. *Connor v. Scott*, 4 Dill. 242.

13. (Aug., 1880.) A case arises "under the Constitution or laws of the United States" whenever, upon the whole record, there is a controversy involving the construction of either. *Cohens v. Virginia*, 6 Wheat. 264; *Mayor v. Cooper*, 6 Wall. 247; *Tennessee v. Davis*, 100 U. S. 275, cited. *Van Allen v. Railroad Co.*, 1 McCrary, 598.

14. (Feb., 1877.) Only suits involving rights depending upon a disputed construction of the Constitution and laws of the United States can be removed from the state to the national courts, under the clause "arising under the Constitution and laws of the United States," of sec. 2 of the act to determine the jurisdiction of the United States courts, passed March 3, 1875 (18 Stat. 470). *Trafton v. Nougues*, 4 Sawyer, 178.

15. Where the only questions to be litigated, in suits to determine the right to mining claims, are as to what are the local laws, rules, regulations, and customs by which the rights of the parties are governed, and whether the parties have in fact conformed to such local laws and customs, the courts of the United States have no jurisdiction of the cases, under the provisions of the act giving jurisdiction in suits "arising under the Constitution and laws of the United States." *Id.*

Removal. Matter in Dispute.

1. (Jan., 1842.) An action was instituted in the Circuit Court of Jefferson County, in the State of Kentucky, by a citizen of that state, under an act of the legislature of Kentucky, against a citizen of the State of Pennsylvania, to recover damages, alleging the same in the declaration to be \$1,000, for having taken on board of the steamboat "Guyandotte," commanded by him, a slave belonging to the plaintiff from the shore of Indiana, on the voyage of the steamboat proceeding up the Ohio River from

Louisville to Cincinnati. The act of the legislature of Kentucky subjects the master of a steamboat to the penalties created by the law, who shall take on board the steamboat under his command a slave from the shore of the Ohio, opposite to Kentucky, in the same manner as if he had been taken on board from the shores or rivers within the state. On entering his appearance, the defendant claimed to remove the cause to the Circuit Court of the United States for the District of Kentucky, he being a citizen of Pennsylvania, and the plaintiff a citizen of Kentucky; and offered to comply with the requisitions of the Judiciary Act of 1789. The court refused to allow the removal of the cause, deciding that it did not appear to its satisfaction that the damages exceeded \$500. The case went on to trial, and the jury gave a verdict for the plaintiff for \$650; and on a writ of error to the Court of Appeals of Kentucky, the judgment of the Circuit Court on the verdict was affirmed. Before the Court of Appeals the plaintiff in error excepted to the jurisdiction of the court of Jefferson County, and also to the constitutionality of the law of Kentucky on which the suit was founded. *Held*, that the decision of the Court of Appeals was erroneous; and the judgment of that court was reversed. *Gordon v. Longest*, 16 Pet. 97.

2. It has often been decided that the sum in controversy in a suit is the damages claimed in the declaration. If the plaintiff shall recover less than \$500, it cannot affect the jurisdiction of the court, a greater sum having been claimed in his writ. But in such case the plaintiff does not recover his costs; and, at the discretion of the court, may be adjudged to pay costs. *Id.*

3. The damages claimed by the plaintiff in his suit give jurisdiction to the court, whether it be an original suit in the Circuit Court of the United States, or brought there by petition from a state court. *Id.*

4. The judge of the state court to which an application is made for the removal of a cause into a court of the United States must exercise a legal discretion as to the right claimed to remove the cause. The defendant being entitled to a right to have the cause removed under the law of the United States, on the facts of the case, the judge of the state court has no discretion to withhold that right. *Id.*

5. (Dec., 1853.) Where a citizen of New Jersey was sued in a state court in New York, and filed his petition to remove the

case into the Circuit Court of the United States, offering a bond with surety, the amount claimed in the declaration being \$1,000, it became the duty of the state court to accept the surety, and proceed no further in the cause. *Kanouse v. Martin*, 15 How. 198.

6. Consequently, it was erroneous to allow the plaintiff to amend the record, and reduce his claim to \$499. *Ib.*

7. (Dec., 1859.) Where the Circuit Court of the United States has jurisdiction over the parties and cause of action, by virtue of the twelfth section of the Judiciary Act, it cannot be affected by any amendment of the pleadings changing the cause of action, or by the proviso to the eleventh section. *Green v. Custard*, 23 How. 484.

8. (Oct., 1847.) The value of the matter in dispute must appear to be over \$500, to justify such removal; but it may appear by the *ad damnum* in the writ, when the declaration discloses no precise sum, or by the declaration in preference to the writ, if a sum certain be claimed there. And if any doubt exists, from different counts claiming different sums, or the subject being real estate, what is the real amount in dispute, the court below may inquire into it by evidence. *Ladd v. Tudor*, 3 Woodb. & M. 325.

9. If that court become satisfied that the plaintiff intended to recover no more than \$500, it is justified in not allowing the action to be removed; but it must not, by a release of damages, amendments, or otherwise, permit the right to remove the action to be taken away, where the plaintiff, at the time of the application, clearly appears to have sought to recover more than \$500. *Ib.*

10. (Nov., 1870.) This suit was commenced in a state court, Aug. 1, 1870, by the service of a summons, for a money demand, on contract, demanding \$330.25, and interest from July 1, 1858, and costs of suit, and was removed into this court by the defendant, under the twelfth section of the act of Sept. 24, 1789 (1 Stat. at Large, 79), the petition for removal stating that the matter in dispute in the suit exceeded the sum of \$500, exclusive of costs. The plaintiff moved this court to remand the cause to the state court, on the ground that, by the summons, the amount in dispute could not be properly said to be over \$500. *Held*, that the case was a proper one for removal, and that the motion must be denied. *Roberts v. Nelson*, 8 Blatchf. 74.

11. The right of removal depends upon the facts as they exist when the suit is commenced. *Ib.*

12. The jurisdiction of this court having once attached, no subsequent event can divest it. *Ib.*

13. It cannot be divested by a reduction, by the declaration filed in this court, of the amount of the claim. *Ib.*

14. Where, by the declaration filed in this court, it appeared that a part of the demand was a claim for merchandise sold to the defendant by one P., who afterwards assigned such claim to the plaintiff, and neither P. nor the defendant was a citizen of the state where the suit was brought, and the plaintiff moved to remand the cause to the state court, on the ground that the suit, so far as such claim was concerned, was a suit to recover the contents of a chose in action, and could not, under the eleventh section of the said act, have been brought by P., if he had not assigned such claim, — *Held*, that this court had a right to proceed in the suit in respect to the rest of the demand, even though it was not over \$500 in amount, exclusive of costs, and that the motion must be denied, both in respect to the entire suit and in respect to such claim. *Ib.*

15. (Nov., 1880.) C. brought a suit at law in a state court of New York against M., to recover \$195, as the purchase-price of the fixtures of a shop. M. put in an answer in the state court, taking issue on the complaint, and claiming that the purchase had been made through fraudulent representations by C. to M. in regard to the subject-matter, and alleging \$750 damages to M. therefrom, and setting that up as a counter-claim, and demanding judgment for the \$750. The plaintiff, by a reply, denied all the allegations of the counter-claim. M. then removed the suit into this court, on the allegation that the matter in dispute exceeded, exclusive of costs, \$500, under sec. 2 of the act of March 3, 1875 (18 Stat. at Large, 470). *Held*, that the case was one for a removal, and that the whole suit was removed, including all the issues raised by the complaint, the answer, and counter-claim, and the reply. *Clarkson v. Manson*, 18 Blatchf. 443.

16. (April, 1810.) In a case removed by the defendant from the state court to the Circuit Court, on the ground that the defendant was an alien, the damages laid in the writ exceeded \$500, and bail to a much larger amount was given, which were held sufficient to give jurisdiction. *Muns v. Dupont*, 2 Wash. 463.

17. It has been frequently determined that the damages laid in the declaration give the jurisdiction as to the matter in dispute. *Ib.*

18. The damages laid in the writ, and in the plaintiff's affidavit, are equally conclusive, as to the amount in controversy, for the purposes of jurisdiction. *Id.*

19. (April, 1816.) If a cause be removed from a state court by the defendant, and the plaintiff declares in the Circuit Court of the United States for more than \$500, the plaintiff cannot, by a release of part of his debt, so as to reduce it to less than \$500, take away the jurisdiction of the Circuit Court. *Wright v. Wells*, Pet. C. C. 220.

20. (1874.) On the removal of a cause from the state court into the federal court, it is sufficient that the matter in dispute exceeds \$500, besides costs, at the time when the right to removal accrues and is applied for. *McGinnity v. White*, 3 Dill. 351.

21. (May, 1880.) A controversy between citizens of different states, as to the validity of an attachment, may constitute a case removable, within the meaning of the statute [Rev. Stat. sec. 639], where the amount in dispute, exclusive of costs, exceeds the sum or value of \$500. *Keith v. Levi*, 1 McCrary, 343.

22. In such case the application for removal should be made upon the attachment issue, and should show affirmatively that the amount in value in that controversy was more than \$500. *Id.*

Removal. Time for filing Petition.

ACT OF MARCH 3, 1875.

SEC. 3. That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a state court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such state court before or at the term at which said cause could be first tried and before the trial thereof, for the removal of such suit into the Circuit Court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit, and any bail that may have

been originally taken shall be discharged; and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court. [*Supplement to Rev. Stat.*, page 174.]

1. (Dec., 1869.) So much of the fifth section of the act of Congress of March 3, 1863, entitled "An Act relating to *habeas corpus* and regulating proceedings in certain cases," as provides for the removal of a judgment in a state court, and in which the cause was tried by a jury, to the Circuit Court of the United States, for a retrial on the facts and law, is not in pursuance of the Constitution, and is void. *The Justices v. Murray*, 9 Wall. 274.

2. (Oct., 1873.) The language, "at any time before the final hearing or trial of the suit," of the act of March 2, 1867, is not of the same import as the language of the act of July 27, 1866, on the same general subject,— "at any time before the trial or final hearing." On the contrary, the word "final," in the first-mentioned act, must be taken to apply to the word "trial" as well as to the word "hearing." Accordingly, although a removal was made after a trial on merits, a verdict, a motion for a new trial made and refused, and a judgment on the verdict, yet it having been so made in a state where by statute the party could still demand, as of right, a second trial, — *Held*, that such first trial was not a "final trial" within the meaning of the act of Congress; the party seeking to remove the case having demanded and having got leave to have a second trial under the said statute of the state. *Insurance Co. v. Dunn*, 19 Wall. 214.

3. (Oct., 1873.) The act of Congress of March 2, 1867, under which a removal may be had of causes from a state to a federal court, only authorizes a removal where an application is made before final judgment in the court of original jurisdiction, where the suit is brought. It does not authorize a removal after an appeal has been taken from such judgment of the court of original jurisdiction to the Supreme Court of the state. *Stevenson v. Williams*, 19 Wall. 572.

4. (Oct., 1874.) Nor if the plaintiff was a citizen of one state and the defendants all citizens of one other state, could such removal be made where one trial has been had and a motion for a new trial is yet pending and undisposed of. To authorize a re-

removal under the above-mentioned act, the action must, at the time of the application for removal, be actually pending for trial. *Vannevar v. Bryant*, 21 Wall. 41.

5. (Oct., 1876.) A suit pending in an appellate state court, after it has been prosecuted to final judgment in a court of original jurisdiction, cannot be removed to the Circuit Court of the United States. *Lowe v. Williams*, 4 Otto, 650.

6. (Oct., 1878.) *Held*, (1.) That the Supreme Court [of Iowa] having, after reversing the judgment of the lower court, still retained jurisdiction of the cause for the purpose of a rehearing, the right of the defendant to a new trial had not been perfected when the petition for removal was filed. *Railroad Co. v. McKinley*, 9 Otto, 147.

7. (2.) That the subsequent judgment in the Supreme Court operated as a revocation of the order to the court below to grant a new trial, and consequently withdrew the case from under that petition. *Sed quære*, Is the filing of the petition and bond in the clerk's office, the court not being in session, sufficient, under any circumstances, to effect a removal? *Ib.*

8. The ruling in *Vannevar v. Bryant* (21 Wall. 41), that after one trial has been had in a state court, the right to another must be perfected before a demand can be made for the removal of the case to the Circuit Court of the United States, reaffirmed. *Ib.*

9. (Oct., 1878.) A., a citizen of Florida, with other persons, some of whom were citizens of New York, was sued by a citizen of the latter state in a court thereof. The plaintiff, in his petition, alleged that the defendants held all the franchises and property of a certain railroad company, and prayed that they be required to hold the income of the railroad in trust, for the payment of a judgment theretofore rendered in his favor, in that court, against the company, and that they be directed to pay him the amount thereof, and for other relief. He averred that A. was indorser on part of the notes on which the judgment had been rendered. There was a judgment in favor of all the defendants, which the Court of Appeals affirmed, except as to A. The cause was remanded for a new trial as to him, solely on account of his alleged liability as such indorser. After the *remititur* went down to the court of original jurisdiction, and before such new trial, A. filed his petition in due form, accompanied by the necessary bond for the removal of the suit, as against him,

to the proper Circuit Court of the United States, under the act of July 27, 1866 (14 Stat. 306). *Held*, that the matter in dispute being sufficient, A. was entitled to a removal of the suit. *Yulee v. Vose*, 9 Otto, 539.

10. (Oct., 1879.) An application made before trial, for the removal to the Circuit Court of a cause pending in a state court, at the passage of said act of March 3, 1875, was in time if made at the first term of the court thereafter. *Removal Cases*, 10 Otto, 457.

11. In order to bar the right of removal, it must appear that the trial in the state court was actually in progress in the orderly course of proceeding, when the application was made. *Ib.*

12. (Oct., 1879.) A suit tried in a state court, April 14, 1875, was, on the disagreement of the jury, continued at that term and the following one. *Held*, that a petition for its removal, filed thereafter, should not be granted. *Bible Society v. Grove*, 11 Otto, 610.

13. (Oct., 1880.) A decree was rendered by the state court against A. by default, although he was not summoned, nor served with a copy of the bill or any notice of the pendency of the suit. On his application within the prescribed period the decree was set aside, and he thereupon filed his petition to remove the cause. *Held*, that it was filed in due time. *Harter v. Kernochan*, 13 Otto, 562.

14. (Oct., 1880.) The removal should not be granted, if the petition therefor be not filed in the state court before or at the term at which the action could be first tried, and before the trial thereof. Where, therefore, a cause, by the practice of the state court, stood for trial upon the issue raised by the petition and answer, the rule-day having expired without filing a reply, and the plaintiff then filed in the clerk's office a reply, without leave or notice, and the cause was continued until the ensuing term, when, before the cause was called for trial, the defendant presented his application for its removal, — *Held*, that the application should not have been granted, and the order of the Circuit Court remanding the cause was proper. *Babbitt v. Clark*, 13 Otto, 606.

15. (July, 1866.) Under the Constitution of the United States, causes may be removed from state courts to the Circuit Courts of the United States, after, as well as before judgment. *Murray v. Patrie*, 5 Blatchf. 343.

16. (April, 1869.) Under the act of July 27, 1868, a petition for removal must be regarded as being filed in the state court, when it is presented to that court with the proper surety; and, when the proper petition is so presented, with the proper surety, so that that court acts upon the matter judicially in any way whatever, whether that court accepts the surety or not, unless it puts its refusal upon some valid defect in the petition, or some insufficiency in the surety, it loses jurisdiction of the cause *eo instanti*. *Fisk v. Union Pacific Railroad Co.*, 6 Blatchf. 362.

17. (Jan., 1872.) A judgment was rendered in a state court, on the report of a referee in favor of the plaintiff, against two defendants. The judgment was reversed, and a new trial was granted. After that, one of the defendants, before another trial, applied to the state court under the act of July 27, 1866 (14 Stat. at Large, 306), for the removal of the suit as against him, into this court. The state court ordered the removal, holding that the case stood for trial as if no former trial had occurred. The plaintiff then moved in this court that the cause be remanded to the state court. *Held*, that, as the act gave the right of removal "at any time before *the* trial or final hearing of the cause," the cause was properly removed. *Dart v. McKinney*, 9 Blatchf. 359.

18. (Oct., 1875.) This action was brought in the Supreme Court for Kings County, in 1869, and thereafter referred to a referee, before whom the plaintiff recovered a judgment, which was set aside by the Court of Appeals, in September, 1874. The *remittitur* from that court was filed Nov. 16, 1874. Before that, the referee had died. There were terms of the circuit in Kings County in October and November, 1874, and January, March, and April, 1875. The cause was removed into this court on the petition of the plaintiff, filed in the state court, April 24, 1875, under the act of March 3, 1875 (18 Stat. at Large, 470). *Held*,

(1.) That this court was the Circuit Court for "the proper district," within the meaning of sec. 2 of the act of 1875, being the Circuit Court for the district within the territorial limits of which the suit was pending in the state court.

(2.) That the petition for removal was not filed in the state court in time, under sec. 3 of the act, not having been filed before or at the term of the state court at which the cause could have been first tried. *Knowlton v. The Congress and Empire Spring Co.*, 13 Blatchf. 171.

19. After the reversal of the judgment, the cause could have been again brought to trial in the state court, before the filing of the petition for removal. *Ib.*

20. (Dec., 1875.) Under sec. 3 of the act of March 3, 1875 (18 Stat. at Large, 471), which requires the application to the state court for the removal of a cause into the Circuit Court of the United States, to be made "before or at the term at which said cause could be first tried," the term referred to is a term occurring after the passage of the act, and not a term before such passage. *National Bank v. Wheeler*, 13 Blatchf. 218.

21. (Jan., 1876.) Under sec. 3 of the act of 1875, which provides that a suit cannot be removed unless the application for removal is made before or at the term at which the cause could be first tried, if the term at which the cause could otherwise be first tried is one which occurs during the time a trial of the cause is stayed by an order of the state court, it is not such a term as is meant by the statute. *Warner v. Pennsylvania Railroad Co.*, 13 Blatchf. 231.

22. (Jan., 1879.) Subdivision 1 of section 639 of the Revised Statutes of the United States, in regard to the removal of causes from state courts, is superseded and repealed by the act of March 3, 1875 (18 Stat. at Large, 470), in respect to a case which is covered both by said subdivision and by sec. 2 of said act. [As to time for filing petition.] *La Mothe Manufacturing Co. v. National Tube Works Co.*, 15 Blatchf. 432.

23. (May, 1879.) A cause was noticed for trial by the plaintiff at a term of the state court, and a note of issue for that term was filed by the plaintiff. Both parties consented that the cause go off for the term, and it was not tried. After the term expired the defendant removed the cause into this court, under the act of March 3, 1875 (18 Stat. at Large, 470). *Held*, that the removal was not in time, not having been made before or at "the term at which said cause could be first tried." *Stough v. Hatch*, 16 Blatchf. 233.

24. (Dec., 1879.) Subdivision 3 of section 639 of the Revised Statutes, in regard to the removal of causes, is not repealed by the act of March 3, 1875 (18 Stat. at Large, 471). *Sims v. Sims*, 17 Blatchf. 369.

25. Where a suit has been tried in the state court, and a judgment had for the plaintiff, and such judgment has been reversed,

on appeal, and a new trial ordered, and proceedings by the defendant to remove the cause into this court are taken before the new trial is had, the application for removal is made before "the trial or final hearing of the suit," and in time, under said subdivision 3. *Ib.*

26. (March, 1880.) The removal was not applied for in time, under sec. 3 of the act of March 3, 1875 (18 Stat. 471), because several terms of the state court had been held after the joining of issue, at which the cause could have been tried, if noticed for trial by the defendant, and there was no obstacle to its being so noticed, although the petition was filed before the commencement of the term for which the cause was first noticed for trial. *Forrest v. Keeler*, 17 Blatchf. 522.

27. (Oct., 1811.) Motion to docket a cause returned from a state court. The defendant's appearance had been entered September, 1809, and after two terms the petition to remove was filed and granted in the state court, as of September, 1809. The court refused the motion. *Gibson v. Johnson*, Pet. C. C. 44.

28. (June, 1876.) The Board of Supervisors of the county, under the laws and Constitution of Virginia, is not a court, and a petition by a creditor, to the board, praying the allowance of his claim, is not a *suit*. But where an appeal is taken from the decision of the board to the County or Circuit Court [state courts], it *then* becomes a suit, and the jurisdiction of such court is *original*, and not *appellate*. *Gurnee v. County of Brunswick*, 1 Hughes, 270.

29. To remove a cause from a state court to the Circuit Court of the United States, under the act of March 3, 1875, application must be made at or before the first term at which the cause may be tried, *i. e.* when the cause is ready for trial, although the court and parties may not be ready to try it. *Ib.*

30. Under the laws and practice of Virginia, an appeal to the County or Circuit Court of the state, from a decision of the Board of Supervisors, disallowing a claim against the county, is triable at the first term of the court after the appeal is taken, *without pleadings*; and an application to remove the cause to the United States court, under the act of March 3, 1875, must be made at that term. If made afterwards, and the removal is effected, the United States court is without jurisdiction, and the cause must be remanded. *Ib.*

31. (Nov., 1878.) The mere fact that a cause is ready at a term of a state court for the *ex parte* execution of a writ of inquiry by the plaintiff, after an office judgment, is not equivalent to its being ready for trial on issues joined, in the sense of sec. 3 of the act of Congress of March 3, 1875, relating to the removal of causes, which requires a petition for removal to be filed at the term at which the cause "could be first tried." *Hunter et al. v. Royal Canadian Insurance Co.*, 3 Hughes, 234.

32. (Nov., 1875.) The trial before which application must be made for the removal of a case from the state to the federal court, in order to warrant such removal under sec. 3 of the act of March 3, 1875 (18 Stat. 420), is such a trial upon either the law or the facts of the case, or both, as settles and concludes the controversy between the parties. *Lewis v. Smythe*, 2 Woods, 117.

33. When such a trial has been commenced, though not concluded, the application for removal comes too late. *Ib.*

34. (Nov., 1875.) By the provisions of sec. 3, act of 1875, a cause pending when the act was passed may be removed to the federal from the state court, if "at or before the first term at which said cause could be first tried" after the passage of the act, the petition and bond are filed. It was so held in a case where there had been a trial, and a new trial was granted before the act passed. *Andrews' Executors v. Garrett*, 1 Flipp. 445.

35. (May, 1876.) The act of Congress of March 2, 1867, only authorizes a removal where an application is made before the final hearing or trial of the suit, and this means before final judgment in the court of original jurisdiction where the suit is brought. *Brice v. Somers*, 1 Flipp. 574.

36. When a case is commenced in the Common Pleas Court of a state, and a trial had in such court, and the case appealed to the District Court of the state, it is then too late to ask to have such cause removed into the United States court, under the above-named act. *Ib.*

37. (Oct., 1876.) Under the act of March 3, 1875, a removal of a suit pending in the state court at the passage of that act, wherein a trial had been had after such passage, cannot be made, although the verdict was set aside and a new trial granted, and the petition for removal was made at the first term at which the second trial could have been had. *Young v. Insurance Co.*, 1 Flipp. 599.

38. (March, 1877.) A case cannot be removed to a federal court after default has been entered, and before the same has been set aside. *McCallon v. Waterman*, 1 Flipp. 651.

39. (Feb., 1869.) An application for removal made after the state Supreme Court had remanded the cause to the state Circuit Court is made "before the final hearing or trial," and is in time. An order of the state Supreme Court reversing the judgment of the Circuit Court, and remanding the cause for further proceedings, opens the case to litigation as if no judgment had ever been rendered. *Akerly v. Vilas*, 2 Biss. 110.

40. (June, 1871.) Under the act of 1789, the removal can only be made on application of the defendant at the time of entering his appearance in the state court. *Kingsbury v. Kingsbury*, 3 Biss. 60.

41. *It seems*, that where a case has gone to decree in the state court, it is too late for any of the parties to remove it to this court. *Ib.*

42. (June, 1872.) Under the act of March 2, 1867, for the removal of causes from state to federal courts, a party whose case has been tried in the state court and appealed to the Supreme Court of the state, where the decree of the court below was reversed with instructions to dismiss the suit, has no right to a removal of the case. *Boggs v. Willard*, 3 Biss. 256.

43. An application comes too late after the issues have been tried in the state court and a final hearing had. *Ib.*

44. It was not the intention of Congress, that a party dissatisfied with an adjudication in the state court should have the right to remove the cause into the federal court and there have a rehearing. *Ib.*

45. (March, 1876.) The term at which a cause could be first tried, within the meaning of sec. 3 of the act of March 3, 1875, is the term at which the issues are first made up, the party applying for removal not having been guilty of negligence. *Scott v. Railroad Co.*, 6 Biss. 529.

46. (May, 1877.) A case pending in the Supreme Court of a state at the time the act of March 3, 1875, in regard to the removal of suits, was passed, and which was remanded from such Supreme Court for further proceedings, stands like a new cause, and consequently the right of removal may be claimed at or before the term at which the case can be tried. *Pettilon v. Noble*, 7 Biss. 449.

47. The defendants not being obliged to redocket the case, were not bound to take affirmative action for a removal, until the complainants had caused the case to be redocketed, of which they were entitled to due notice. *Ib.*

48. (1873.) Whether under the act of March 2, 1867, which requires the application for the removal of a cause from the state court to the federal court to be made "before the final hearing or trial of the suit," a suit in equity can be removed when pending in an appellate tribunal, *quære*. *Waggener v. Cheek*, 2 Dill. 560.

49. Such a suit cannot be removed from the appellate court after it has been finally submitted to it. *Ib.*

50. (1874.) Under the act of Congress of March 2, 1867 (14 Stat. 558), an action may be removed from the state court of original jurisdiction, in which it is then pending, to the Circuit Court of the United States, after a judgment in favor of one of the parties has been wholly reversed by the state Supreme Court, and a trial *de novo* ordered, if the removal is applied for before the second trial is commenced. Following *Johnson v. Monell* (1 Woolw. 390). *Kellogg v. Hughes*, 3 Dill. 357.

51. (1875.) Application for removal may be made after a new trial on the merits has been granted, and before the new trial has been commenced. *Minnett v. Railway Co.*, 3 Dill. 460.

52. (1877.) Under the act of March 3, 1875, application to remove a cause must be made to the state court at or before the term in which, according to the local law and practice of the court, the cause could have been finally heard. Accordingly, where issue was joined nearly one month before the end of a term of the state court, and it does not appear but that a final hearing could have been had at that term, an application thereafter made to remove the cause, under the act of 1875, will be denied. (See on this point, *Scott v. Clinton and Springfield Railroad*, 6 Biss. 529.) *Ames v. Railroad Co.*, 4 Dill. 260.

53. (1877.) Such removal, however, must be before trial in the court of original jurisdiction, and cannot be made from a court to which, after hearing, an appeal has been taken. *Craigie v. McArthur*, 4 Dill. 474.

54. (1877.) The act of Congress of March 3, 1875 (sec. 3), requires the petition for the removal of causes from the state court to the Circuit Court, to be made "before or at the term at

which the cause could be first tried, and before the trial thereof." The Code of Iowa provides that law actions "shall be tried at the first term after legal and timely service has been made." *Held*, that this provision limits the time in Iowa at which the application for the removal of law actions, under the act of March 3, 1875, can be made. *Atlee v. Potter*, 4 Dill. 559.

55. Accordingly, an application in Iowa, by the defendants, for the removal of a law action which was not made at the return term, nor at the next term, when the defendants entered their appearance, nor yet at the next succeeding term, is not in time, under the act of March 3, 1875, although it was made at the term at which the answer was filed, and the issues of fact completed. *Ib.*

56. In view of the specific provisions of the Code of Iowa, definitely fixing the time for the trial of law actions, the time for the removal, under the act of March 3, 1875, cannot be extended by the circumstance, that in point of fact the issues are not made up at the first term. It might be different in the absence of statutory regulation as to what shall be the trial term. *Ib.*

57. (1877.) An action at law in the state court was commenced by attachment, but no process was issued or served. At the next term the defendant, by consent, entered an appearance, and, by consent, also, the cause was continued, and leave given to the defendant until the second day of the next term to answer; all of which was contained in the same journal entry. The Code of Iowa provides that such actions "shall be tried at the first term after legal and timely service." At the term to which the cause was thus continued, a petition, under the act of March 3, 1875, for the removal of the cause to the Circuit Court of the United States was filed. *Held*, under the circumstances, that the application for the removal was in time. *McCullough v. Furniture Co.*, 4 Dill. 563.

58. If the entry of an appearance by the defendant had been general and unconditional, and at a term prior to the order for continuance, a different question would have been presented. *Ib.*

59. (1877.) Under the Code of Iowa, equity suits are not triable at the appearance term, and such suits may, under the act of March 3, 1875 (sec. 3), be removed to the Circuit Court of the United States at the second term. *Palmer v. Call*, 4 Dill. 566.

60. Under that code, the same rule as to the time of removal applies to suits to foreclose mortgages, at least when there is no rule of court requiring such suits to be tried at the appearance term. *Ib.*

61. (March, 1880.) The right to remove a cause from a state court, under the act of March 3, 1875, is lost where such cause was tried in a term which began before, but at a date which was subsequent to, the passage of that act. *State of Missouri v. Merritt*, 1 McCrary, 65.

62. (June, 1880.) Under the act of 1875, a petition for removal must be filed before or at the term at which the cause might first by law be tried, although the pleadings have not been settled at that time. *Murray v. Holden*, 1 McCrary, 341.

63. (Aug., 1880.) Where a state statute did not fix the time within which the pleadings should be filed, it was the duty of the state court, upon the application of the parties, to fix a time, and, having done so, the cause was not triable until issue could be joined in pursuance of the court's order. *Van Allen v. Railroad Co.*, 1 McCrary, 598.

64. (Dec., 1875.) A suit was pending in the Supreme Court of California, on appeal from the judgment of the District Court of the State of California, at the date of the passage of the act of Congress of March 3, 1875, relating to the jurisdiction of the United States Circuit Courts, in which the judgment was reversed, and the cause subsequently remanded to the District Court of the state for new trial. At the first term of the District Court of the state at which a trial could be had after the filing of the *remittitur*, and before any other trial, the suit was removed to the United States Circuit Court on application of the plaintiff. *Held*, that the case is within the provisions of secs. 2 and 3 of said act of Congress, and that it was properly removed. *Hoadley v. San Francisco*, 3 Sawyer, 553.

Removal. Minor.

1. (June, 1871.) A minor is incapable of consenting to a change of forum. The state court having obtained jurisdiction of his person and property, neither his guardian *ad litem* nor any other person for him can consent to a removal. *Kingsbury v. Kingsbury*, 3 Biss. 60.

Removal. Suit originally brought in a Territorial Court.

1. (1877.) The act of March 3, 1875, which provides that any suit "now pending or hereafter brought in any state court" of the description therein specified, may be removed into a federal court, is not applicable to a suit brought in a territorial court, although, on the admission of the territory as a state, such suit passed into the jurisdiction of a state court. *Ames v. Railroad Co.*, 4 Dill. 260.

Removal. Petitions Several.

1. (Oct., 1880.) The second clause of the second section of the act of March 3, 1875, ch. 137 (18 Stat., pt. 3, p. 470), construed and *held* that, when in any suit mentioned therein, there is a controversy wholly between citizens of different states, which can be fully determined as between them, then either one or more of the plaintiffs or the defendants actually interested in such controversy may, on complying with the requirements of the statute, remove the entire suit. *Barney v. Latham*, 13 Otto, 205.

2. The right of removal depends upon the case disclosed by the pleadings when the petition therefor is filed, and is not affected by the fact that a defendant who is a citizen of the same state with one of the plaintiffs may be a proper, but not an indispensable, party to such a controversy. *Ib.*

3. (April, 1825.) Where there are several defendants entitled on appearance to remove a cause from the state court into a Circuit Court, some of whom have appeared and others not, those who have appeared cannot alone remove the cause. *Ward v. Arredondo*, 1 Paine, 410.

4. But this rule is confined to cases where, from the subject-matter of the suit, the judgment or decree must be joint. *Ib.*

5. Defendants can remove the cause or appear in the Circuit Court at different times, where their appearance is entered at different times in the state court. *Ib.*

6. Where some of the defendants have removed the cause regularly into a Circuit Court, the others cannot enter an original appearance in such court. *Ib.*

7. The Circuit Court can remand the cause, in case the defendants do not all eventually appear. *Ib.*

8. A state court cannot cause an appearance to be entered *nunc pro tunc*, so as to entertain a motion for removal. *Id.*

9. (Nov., 1870.) Under the act of July 27, 1866 (14 Stat. at Large, 306), two out of several defendants in a suit cannot remove the suit, as between the plaintiff and such two defendants, into this court, unless there can be a final determination of the controversy, so far as it concerns such two defendants, without the presence of the rest of the defendants. *Bixby v. Couse*, 8 Blatchf. 73.

10. Under the act of March 2, 1867 (*id.* 558), all the defendants in a suit, who are not merely nominal defendants, must be citizens of a state or states other than the state in which the suit is brought, and must unite in the petition for removal, or there can be no removal of the suit. *Id.*

11. (Feb., 1871.) Under the act of July 27, 1868 (15 Stat. 226), all the parties who claim the right of removal need not join in one petition; but they may petition for the removal as they are served with process or otherwise brought into court. *Fisk v. Union Pacific Railroad Co.*, 8 Blatchf. 243.

12. (May, 1879.) W. brought suit in a state court of New York against D. and K. and R., as copartners, to recover on a promissory note. Process was served on D. alone. He alone appeared. W. and K. were, at the time the suit was commenced, citizens of New York. D. and R. were, at the time, citizens of California. D. took proceedings under subdivision 2 of section 639 of the Revised Statutes, to remove the suit, so far as it concerned him, into this court, without notice to the attorney of W. The petition for removal was not signed or verified by D., but by D.'s attorney in the suit. W. moved to remand the cause to the state court. *Held*, —

(1.) Subdivision 2 of section 639 of the Revised Statutes was not repealed by the act of March 3, 1875 (18 Stat. at Large, 470).

(2.) The suit was one in which there could be a final determination of the controversy, so far as concerned D., without the presence of K. and R. as parties.

(3.) Any rights which W. would have had as against K. and R. from serving process on D., remain to W. in this court. *Wormser v. Dahlman*, 16 Blatchf. 319.

13. (Oct., 1822.) If there be two defendants in the state

court, the cause cannot be removed into the Circuit Court upon the petition of one of the defendants. *Beardsley v. Torrey*, 4 Wash. 286.

14. (Oct., 1856.) If, in a joint action against two defendants, both residents of another state, brought in an Ohio court, as to one of whom the process is served, and as to the other returned *not found*, the party served removes the case to the Circuit Court of the United States, pursuant to sec. 12 of the Judiciary Act of 1789, the plaintiff is entitled to process from that court against the defendant, who was not made a party in the state court. *Fallis, Brown, & Co. v. McArthur & Berry*, 1 Bond, 100.

15. In such a case, the plaintiff may proceed against the defendant who has been served with process, as the Circuit Court has jurisdiction under sec. 1 of the act of Feb. 28, 1839, and may hear and decide the case as against such defendant, without making the other defendant a party to the suit. *Ib.*

16. (April, 1875.) Removal of causes. Act of Congress of March 3, 1875 (10 Stat. 470), construed. *Osgood v. Railroad Co.*, 6 Biss. 330.

17. This act consolidates and repeals all previous general acts of Congress on the subject. *Ib.*

18. Since its passage a defendant, though a citizen of the state where the suit is brought, may remove the case from the state to the federal court. *Ib.*

19. Petitioners may have a removal, though their co-defendants do not join in the petition, if the controversy is wholly between them and the plaintiff, and can be fully determined as between them; and such a case arises where a bill is filed by a bondholder of a railroad company, and the company, its officers, and the trustees under its mortgages, petition for removal. *Ib.*

20. The existence of judgment creditors, and the fact that one of them has filed a cross-bill, does not affect the right of removal. *Ib.*

21. Seizure of the *res* by a state court does not affect the case, for that is necessarily transferred with the case. *Ib.*

22. Collateral issues connected with the *res* in the state court do not destroy the right of removal, provided the parties are within the statute. *Ib.*

23. (1873.) Under the act of July 27, 1866, the non-resident defendant may remove the cause, as to him, where there can be

a final determination of the controversy without the presence of a resident co-defendant. *Allen v. Ryerson*, 2 Dill. 501.

24. In this case it was held that there could be such a final determination. *Ib.*

25. (1874.) One of several defendants sued as copartners may, if the other requisites exist, have the cause removed into the federal court so far as concerns himself. *McGinnity v. White*, 3 Dill. 351.

26. (Sept., 1867.) An application to a state court for removal of a cause need not be made at the same time by all the defendants, though, under the construction given to sec. 12 of the Judiciary Act (1 Stat. 79), all the defendants must have been entitled to such removal. *Field v. Lownsdale*, Deady, 288.

27. Certain defendants not served or appearing in the state court where an order of removal was made are not affected by it, and as to them the cause is still pending in that court, and must be removed by its order, upon the petition of such defendants, before they can come into the national court. *Ib.*

28. The act of July 27, 1866 (14 Stat. 306), gives each defendant in a cause the right of removal without reference to the *status* of his co-defendant, "if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause." *Ib.*

29. A suit to quiet title to real property against several defendants, who, as alleged in the bill, claim to be the owners of the same as tenants in common, "is one in which there can be a final determination of the controversy," as to each defendant, without the presence of the other, as a party in the cause, and therefore within the act of July 27, 1866, aforesaid. *Ib.*

30. (July, 1868.) The act of July 27, 1866 (14 Stat. 306), gives each defendant in a cause the right of removal, without reference to the *status* of his co-defendants, "if the suit is one on which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants, as parties in the cause." *Fields v. Lamb*, Deady, 430.

31. The act of March 2, 1867 (14 Stat. 558), does not in any particular repeal the act of 1866, but is supplemental thereto, and adds another cause for removal of cases from the state to the national courts. *Ib.*

32. (May, 1878.) Where D., a citizen of California, filed a bill [in a state court] to foreclose a mortgage against M., the mortgagor, also a citizen of California, and F., a subsequent incumbrancer and a citizen of New York, there can be no final determination of the controversy between D. and F., without the presence of M.; and the suit is not removable by F. to the Circuit Court of the United States, under sec. 639 of the Revised Statutes. *Donohoe v. Mariposa Land and Mining Co.*, 5 Sawyer, 163.

33. Neither in such case, where the only controversy is as to the validity of the mortgage, and whether there is anything due on it, is there "a controversy which is wholly between citizens of different states," or "which can be fully determined as between them," within the meaning of sec. 2 of the act of March 3, 1875 (18 Stat. 470), and the case cannot be removed to the national court, under the provisions of that act. *Ib.*

34. Where a cross-bill filed by one defendant against complainant and its co-defendant, only sets up the same matter as that set up in the respective answers of the defendants to the original bill, it is merely matter of defense, and in no way affects the right of removal under the statutes cited. *Ib.*

35. (Jan., 1880.) Under the first clause of the second section of the act of 1875, which reads, "in any suit of a civil nature, . . . in which there shall be a controversy between citizens of different states, . . . either party may remove said suit," it is necessary, to authorize a removal, that all the parties on one side shall be citizens of different states from those on the other side of the controversy. But to determine the right of removal, the parties may be transposed and arranged on opposite sides of the controversy according to their real interests, without regard to their formal position on the record as plaintiffs or defendants. *Burke v. Flood*, 6 Sawyer, 220.

36. B., a citizen of California, filed his bill in equity [in a state court], as a stockholder therein, against the C. V. M. Co., a California corporation, the P. W. L. & F. Co., also a California corporation, F., a citizen of California, and M. and F., citizens of Nevada, all the latter being stockholders and officers or agents of both corporations, for an account between said corporations, and the P. W. L. & F. Co., and F., M., and F., and for a recovery from said defendants by the C. V. M. Co. of a large amount of

profits on numerous contracts alleged to have been fraudulently made in pursuance of a conspiracy, through defendants, F., M., F., and O'B., acting as officers and agents of both corporations, and which profits came to the possession of F., M., F., and O'B., in dividends from P. W. L. & F. Co., the parties other than the corporations being copartners in business, and their acts complained of being their joint acts for their joint benefit as such copartners. The suit having been removed from the state court to the United States Circuit Court as to M. and F., citizens of Nevada, under sec. 639 of the Revised Statutes, on motion to remand, — *Held*, that there could not be a final determination of the whole controversy as to M. and F. without the presence of the P. W. L. & F. Co. and F., and that for this reason the suit was not removable as to M. and F., under the provisions of said section. *Ib.*

37. (Dec., 1880.) Under the second clause of sec. 2 of the act of March 3, 1875, any suit mentioned therein is removable whenever it involves a controversy wholly between citizens of different states, and which can be fully determined as between them, upon the petition of either one or more of the plaintiffs or defendants actually interested in such controversy; and it is immaterial whether such controversy is considered the main or principal one in the suit or not, or what other controversies or parties are incidentally or otherwise involved in it. *Bybee v. Hawkett*, 6 Sawyer, 593.

Removal. Petitions, Form.

1. (Oct., 1879.) The petition for removal (*infra*, p. 463), held to be sufficient in form. *Removal Cases*, 10 Otto, 457.

2. (May, 1879.) The petition was sufficiently signed and verified [by the attorney for the party]. *Wormser v. Dahlman*, 16 Blatchf. 319.

3. (Feb., 1880.) Some of the petitioners for removal signed the petition by an attorney, but the order of the state court for the removal stated that the petition was duly made and filed by the petitioners, and that the petitioners appeared by counsel and moved for such order. On the contents of the petition and the bond, and the action of the petitioners by their counsel, in moving for such order, and the contents of such order, — *Held*, that the petition must be regarded as the petition of the petitioners. *Cooke v. Seligman*, 17 Blatchf. 453.

4. The averment in the petition that certain of the petitioners, "as they are the qualified executors of the last will and testament of J. B., deceased," were and are citizens of the State of New York, was *held*, in this case, to mean, that they were sued as such qualified executors, and to be an averment of their personal citizenship. *Ib.*

5. (May, 1878.) The act of March 3, 1875 (18 Stat. 470), does not require the petition for removal to be verified; it is nevertheless eminently proper that it should be. *Houser v. Clayton*, 3 Woods, 273.

6. (May, 1848.) A petition to remove a case from a state court to the "Circuit or District Court" of the United States, which was granted, creates no uncertainty, as the removal can only be to the Circuit Court. *McVaughter v. Cassily*, 4 McLean, 351.

7. (April, 1875.) It is not necessary that the petition for removal be verified by affidavit. *Osgood v. Railroad Co.*, 6 Biss. 331.

8. (1870.) Under the provisions of the Judiciary Act of 1789, where application is made to remove a cause from the state court to the United States Circuit Court, on account of the citizenship of the parties, it is not necessary that the petition filed for that purpose should be verified by affidavit. *Sweeney v. Coffin*, 1 Dill. 73.

9. Under the subsequent acts of 1833, March 3, 1863, July 29, 1866, and March 2, 1867, the petition for removal must be verified by affidavit. *Ib.*

10. (1873.) A cause removed from the state to the federal court, under the act of July 27, 1866, will not be remanded to the state court, merely because the petition for removal does not appear to have been verified. *Allen v. Ryerson*, 2 Dill. 501.

11. (1877.) The petition for the removal of a cause, under the act of 1875, is not required to be sworn to. *Connor v. Scott*, 4 Dill. 243.

Removal. Petitions, Substance.

1. (Dec., 1855.) In a petition for removal, it is not enough to allege that the petitioners were *residents* in another state. They must allege that they were *citizens*. *Parker v. Overman*, 18 How. 137.

2. (Oct., 1877.) A person not a citizen of the state, in a court whereof he is sued, cannot, under the twelfth section of

the Judiciary Act of 1789, remove the suit to the Circuit Court of the United States, by reason of the citizenship of the parties, unless his petition for removal affirmatively shows that the plaintiff was, at the time of the commencement of the suit, a citizen of such state. *Insurance Co. v. Pechner*, 5 Otto, 183.

3. The right of removal is statutory, and, before a party can avail himself of it to oust the jurisdiction of a state court, he must show upon the record that his case is one which comes within the provisions of the statute. *Ib.*

4. (Oct., 1877.) A petition for the removal from a state court, of a suit brought by the plaintiffs in their representative capacity as executors, is insufficient, under the act of March 2, 1867 (14 Stat. 558), where the defendant, who is not a citizen of the state where the suit is brought, alleges, so far as the citizenship of the plaintiffs is concerned, that they, "as such executors," are citizens of that state. *Amory v. Amory*, 5 Otto, 186.

5. Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, it has reference to their personal citizenship. *Ib.*

6. *Insurance Company v. Pechner* (*supra* p. 183) cited and approved. *Ib.*

7. (Oct., 1877.) A petition for the removal of a suit from a state court to a federal court is insufficient, unless it sets forth in due form, such as is required in good pleading, the essential facts not otherwise appearing in the case, which, under the act of Congress, are conditions precedent to the change of jurisdiction. *Gold-Washing & Water Co. v. Keyes*, 6 Otto, 199.

8. (Oct., 1879.) A. was, in a state court of Tennessee, indicted for murder. In his petition, duly verified, for removal of the prosecution to the Circuit Court of the United States, he stated that, although indicted for murder, no murder was committed; that the killing was done in necessary self-defense, to save his own life; that at the time the alleged act for which he was indicted was committed, he was, and still is, an officer of the United States, to wit, a deputy collector of internal revenue; that the act for which he was indicted was performed in his own necessary self-defense while engaged in the discharge of his duties as deputy collector, and while acting by and under the authority of the internal revenue laws of the United States; that what he did was done under and by right of his said office;

that it was his duty to seize illicit distilleries and the apparatus used for the illicit and unlawful distillation of spirits, and that while attempting to enforce said laws, as deputy collector as aforesaid, he was assaulted and fired upon by a number of armed men, and that in defense of his life he returned the fire, which is the killing mentioned in the indictment. *Held*, that the petition was in conformity with the statute, and, upon being filed, the prosecution was removed to the Circuit Court of the United States for that district. *Tennessee v. Davis*, 10 Otto, 257.

9. . . . The exercise of the power to remove criminal prosecutions is seen in the act of Feb. 4, 1815 (3 Stat. 198); again in the third section of the act of March 2, 1833 (4 id. 633); and more recently in the act of July 13, 1866 (14 id. 171). *Ib.*

10. (Oct., 1880.) The citizenship of the parties need not be averred in the petition for removal where it is shown by the record. *Bondurant v. Watson*, 13 Otto, 281.

11. (April, 1869.) Where, in a petition for removal, under the act of July 27, 1868, the defendants petitioning comply with the act by setting out that they have a defense in the suit arising under the Constitution of the United States and the laws of the United States, that averment must, in the court of the United States, be accepted as true until it is disposed of on the trial of the case. *Fisk v. Union Pacific Railroad Co.*, 6 Blatchf. 362.

12. (Dec., 1873.) A petition under the act of July 27, 1868 (15 Stat. 227), stating that the defendant has a defense to an action brought, arising under an act of Congress, giving the title of such act, is sufficient, although it does not state what the defense is, or what are the facts which constitute it. *Jones v. Oceanic Steam Navigation Co.*, 11 Blatchf. 406.

13. The question of the actual existence and validity of the alleged defense cannot be determined on an interlocutory motion, if the proceedings for removal have conformed to the statute, but can be determined only on formal pleadings and proofs in this court. *Ib.*

14. (Jan., 1879.) What are sufficient averments in a petition for the removal of a cause. *La Mothe Mfg. Co. v. National Tube Works Co.*, 15 Blatchf. 432.

15. (May, 1879.) Under secs. 2 and 3 of the act of March 3, 1875 (18 Stat. at Large, 470, 471), a suit may be removed into this court from a state court, on a petition by the defendant,

averring that the defendant is a corporation created by, and a citizen of, one state, and that the plaintiff is a citizen of another state, without averring that the plaintiff was, at the time of the commencement of the suit, a citizen of a different state from the defendant. *McLean v. St. Paul & Chicago Railway Co.*, 16 Blatchf. 309.

16. (Dec., 1879.) In a suit by a corporation of one state against a citizen of another state, it is sufficient, in a petition for removal by the defendant, under the first clause of said sec. 2 [of the act of March 3, 1875], to state that the defendant *is* a citizen of such other state, and it is not necessary to state that he was such citizen when the suit was commenced. *Chicago, St. Louis, & New Orleans Railroad Co. v. McComb*, 17 Blatchf. 372.

17. (Jan., 1878.) Members of the Election Returning Board established by the law of Louisiana are, even when engaged in canvassing the votes cast for presidential electors, state and not federal officers. *Ex parte Anderson*, 3 Woods, 124.

18. The petition of a party against whom a prosecution has been instituted in a state court to remove such prosecution to the federal court, on the ground that the same is on account of an act done under the provisions of Title XXVI., U. S. Revised Statutes, should state such facts as show to the court that the case falls within the category of removable causes. *Ib.*

19. (April, 1878.) Under the act of March 3, 1875, for the removal of causes (18 Stat. 470), the petition for removal need not aver that the parties were citizens of different states at the time the suit was brought. If they are citizens of different states when the petition for removal is filed, it is sufficient. *Jackson v. Insurance Co.*, 3 Woods, 413.

20. (Feb., 1877.) A petition for the removal of a suit from a state to a national court, on the ground that it arises under the Constitution and laws of the United States, must state the facts and indicate the questions arising therein, which are claimed to give the national court jurisdiction, so that the court can determine for itself from the facts the question of jurisdiction. *Trafton v. Nougues*, 4 Sawyer, 179.

21. A petition which only states the opinion or conclusion of the petitioner, that the case arises under the Constitution and laws of the United States, is insufficient; and a suit removed on such petition will be remanded. *Ib.*

Removal. Amendment of Petition.

1. (May, 1878.) The petition for the removal of a cause from the state to the federal court, may be amended. *Houser v. Clayton*, 3 Woods, 273.

Removal. Surety.

1. (June, 1877.) A suit was brought in a state court, in August, 1875, and proceedings for its removal into this court were taken, under subd. 3 of sec. 639 of the Revised Statutes. The bond given was such a bond as is provided for by sec. 639, and not such a bond as is provided for by sec. 3 of the act of March 3, 1875 (18 Stat. at Large, 470). It contained no provision for costs. *Held*, that the suit was not properly removed. *Torrey v. Grant Locomotive Works*, 14 Blatchf. 269.

2. (Feb., 1880.) The absence of any acknowledgment or proof of the execution of the bond was held to be a matter of practice for the state court to pass upon, and not reviewable by this court, after the state court had accepted the bond. *Cooke v. Seligman*, 17 Blatchf. 453.

3. The bond contained, in its condition, a clause providing that the defendant should do, or cause to be done, such other and appropriate acts as, by said act of 1875 (18 Stat. at Large, 470), and other acts of Congress, are required to be done, on the removal of a suit. *Held*, that such clause was a sufficient compliance with any requirement in sec. 3 of the act of 1875, that the bond should be one for appearing in the federal court. *Id.*

4. (Dec., 1877.) The approval, by the state court, of the bond for removal of a cause, is not necessary to the jurisdiction of the federal court. *Dennis v. County of Alachua*, 3 Woods, 684.

5. (Feb., 1876.) The jurisdiction of a state court over a controversy rightfully in its possession, cannot be dislodged except by fully complying with the requirements of the acts of Congress authorizing the transfer of causes from the state to the federal tribunals. *Burdick v. Hale*, 7 Biss. 96.

6. A bond given in pursuance of the act of March 3, 1875, in which the place where the penal sum should have been inserted is left blank, is insufficient; for although an undertaking to pay an indefinite amount would have satisfied the act, no sum being named as a penalty, no liability is created. *Id.*

7. Where the act requires that the condition of the bond shall be, that the party removing the suit will enter in the Circuit Court of the United States, on the first day of its next session, a copy of the record in such suit, and for paying all costs that shall be awarded by said Circuit Court, and the condition in the bond given is that plaintiff shall file in the Circuit Court "copies of all process," such bond is insufficient. *Ib.*

**Removal. Proceedings to give Jurisdiction to Circuit Court.
State Court to proceed no further.**

1. (Jan., 1842.) The application to remove the cause having been made in proper form, and no objection having been made to the facts on which it was founded, it was the duty of the state court "to proceed no further in the cause;" and every step subsequently taken in the exercise of a jurisdiction in the case, whether in the same court or in the court of appeals, was *coram non judice*. *Gordon v. Longest*, 16 Pet. 97.

2. One great object in the establishment of the courts of the United States, and regulating their jurisdiction, was to have a tribunal in each state, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress. And this object would be defeated, if a state judge, in the exercise of his discretion, may deny to the party entitled to it a removal of the cause. *Ib.*

3. (Oct., 1880.) A party to a suit, who, under the act of March 3, 1875, c. 137 (18 Stat. part 3, page 470), was entitled to its removal from the state court wherein it was brought, filed in due time his petition and the requisite bond, and prayed for such removal to the Circuit Court of the United States for the proper district. His petition was denied. *Held*, that, on his entering in the Circuit Court, within the period prescribed by that act, the transcript of the record, the Circuit Court acquired jurisdiction of the suit, and that all subsequent proceedings of the state court therein are absolutely void. *Kern v. Hvidekoper*, 13 Otto, 485.

4. (April, 1868.) When the proper steps to effect the removal of a cause, under the act of Sept. 24, 1789, have been taken, and evidence thereof is presented to the state court, the right to have the removal made is perfected, and no action of the state

court can either confer the right or take it away. *Hatch v. Chicago, Rock Island, & Pacific Railroad Co.*, 6 Blatchf. 105.

5. The discretion to be exercised by the state court in passing on the question as to whether such proper steps have been taken, is a legal discretion. *Ib.*

6. No order by the state court for the removal of the cause is necessary. *Ib.*

7. If the defendant does all that is necessary to secure a removal, he can, whether the state court makes an order of removal or not, perfect the removal by entering in the federal court, at the proper time, copies of the proper papers, and his appearance, and special bail if necessary ; and when that is done, the cause will proceed in the federal court. *Ib.*

8. (April, 1869.) The right to remove a cause, under all the acts of Congress providing for removals, is a right conferred directly by the acts of Congress, and is not dependent upon the volition, or action, or non-action of a state court. *Fisk v. Union Pacific Railroad Co.*, 6 Blatchf. 362.

9. Where a suit is removed into this court under the act of July 27, 1868, as respects all the parties to it, and all the subject-matter involved in it, all further proceedings in it in the state court are void ; and, although the state court may be proceeding further in it at the instance of a party to it, it is not necessary to the exercise of the jurisdiction of this court that it should make an order staying all proceedings in the suit by such party in the state court, and therefore such order will not be made. *Ib.*

10. (Feb., 1871.) The application to the state court, on the petition for removal, is *ex parte* ; no notice of presenting it to the state court need be given, and no affidavits can be read before the state court in opposition. *Fisk v. Union Pacific Railroad Co.*, 8 Blatchf. 243.

11. (Jan., 1879.) What is a sufficient appearance by a defendant corporation to give to a court jurisdiction over it, so as to make its proceedings to remove the cause to a federal court valid. *La Mothe Mfg. Co. v. National Tube Works Co.*, 15 Blatchf. 432.

12. (May, 1879.) Notice of the application for the removal was not necessary. *Wormser v. Dahlman*, 16 Blatchf. 319.

13. (Dec., 1877.) In order to remove a suit from a state court to a United States court, under the Judiciary Act of March 3, 1875, the mere filing of the petition and bond in the state court,

by the party entitled to remove the suit, is sufficient; and the jurisdiction to determine whether or not the case was removable, and was properly removed, and a sufficient bond given, is in the United States Circuit Court, and not in the state court. *Cobb v. Globe Mutual Life Ins. Co.*, 3 Hughes, 452.

14. The United States Circuit Court in which the copy of the record of the state court, in a removed suit, must be filed, and in which the party making the removal must enter his appearance, is the court held at the place in which the suit in the state court was brought, or the place of holding the United States court most convenient to that place. *Ib.*

15. (Nov., 1875.) In a case which can be removed from the state to a federal court, under the act of Congress of March 3, 1875, the timely presentation of the petition and bond for removal is effectual to suspend all the powers of the state court in which the suit is pending. *Ellerman v. Railroad Co.*, 2 Woods, 120.

16. An appeal does not lie to an order of a state court, for the removal of a cause to a federal court; and although the requirements necessary to a suspensive appeal from such an order may have been observed, they are not effectual to prevent a removal. *Ib.*

17. (May, 1878.) Said act of March 3, 1875 (18 Stat. 470), does not require that the order for removal of the cause should be made before appearance by defendant. *Houser v. Clayton*, 3 Woods, 273.

18. (Jan., 1876.) No action of the state court can confer or take away the right of removal. No order of the state court for the removal of the cause is necessary. The right is not dependent on the state court. *Clippinger v. Life Ins. Co.*, 1 Flipp. 456.

19. The party seeking a removal is to do all that is necessary to secure a removal. Whether the state court makes an order for removal or not, he can perfect the removal by entering in this court, at the proper time, copies of the proper papers, and his appearance and special bail, if necessary. *Ib.*

20. (Jan., 1864.) Removal of causes. Under the twelfth section of the Judiciary Act of 1789, it is for the state court to decide the questions arising under the petition; and this court cannot review its decision. *Hough v. Western Transportation Co.*, 1 Biss. 425.

21. The remedy is by appeal to the Supreme Court of the State, and thence by writ of error to the United States Supreme Court. *Ib.*

22. (Feb., 1869.) Where application for the removal of a cause from the state to the United States court is in proper form, and the facts on which the application is founded are made to appear according to the requirements of the act, the party is entitled to have the cause removed, and the judge of the state court has no discretion. *Akerly v. Vilas*, 2 Biss. 110.

23. (June, 1871.) This court will not entertain jurisdiction of a case brought up by stipulation of parties from the state court, unless the record shows the existence of the facts contemplated by the acts of Congress concerning removals from state courts. *Kingsbury v. Kingsbury*, 3 Biss. 60.

24. (April, 1875.) The petition and bond [for the removal of a cause, under the act of March 3, 1875], may be filed in the state court during vacation, and may be sufficient, though there was no action upon the petition or bond. *Osgood v. Railroad Co.*, 6 Biss. 331.

25. Irregularities in the removal do not vitiate it, nor authorize the federal court to remand or dismiss it. If the court has jurisdiction, it should retain the case. *Ib.*

26. When the petition and bond are filed in the state court during vacation, the jurisdiction of that court ceases. It does not remain until the court can act upon them in term time. And it is not for the state court to decide whether a proper case is made. *Ib.*

27. (1870.) The filing of the petition for removal is a sufficient appearance to the suit to give the court jurisdiction of the person; and the question as to citizenship of the parties can be raised in the United States court. Under the provisions of the Judiciary Act of 1789, if the party fail to file a petition for removal at the time of entering his appearance, he will be precluded from doing so at any subsequent stage of the proceedings. *Sweeney v. Coffin*, 1 Dill. 73.

28. (1875.) The act of March 2, 1867, as to the removal of suits from the state to the federal court, although technically repealed by the Revised Statutes, is therein substantially re-enacted; and a party, on complying with its provisions, is entitled to a removal of the cause. *Minnett v. Railway Co.*, 3 Dill. 460.

29. The president, and perhaps the general manager, of a railway company is, *prima facie*, entitled to make the required affidavit in such a case. *Ib.*

30. (1877.) The mere filing of the petition and bond removes the cause *ipso facto*, if the cause is removable and the petition and bond are filed in due time and are in due form. *Connor v. Scott*, 4 Dill. 243.

31. (Aug., 1877.) Where proceedings have been perfected for removing a cause from a state court to the Circuit Court of the United States, under the act of Congress of 1875 (18 Stat. 470), the Circuit Court, upon petition and notice to the adverse party, will grant leave to file a copy of the record in said court before the first day of the next succeeding term thereafter, for the purpose of administering without delay any of the provisional remedies to which the petitioning party may be entitled. *Mahoney Mining Co. v. Bennett*, 4 Sawyer, 289.

32. The Circuit Court, upon such petition and notice, has jurisdiction to grant leave to file the record before the day appointed by statute; and, after the filing of the record in pursuance of such leave, to proceed to grant any provisional relief to which the party may be entitled. *Ib.*

33. (May, 1878.) When the proper proceedings for the removal of a cause have been taken in the state court, the Circuit Court has jurisdiction of the cause, for the purpose of granting a provisional remedy, before the first day of the next term on which the party removing the cause is, by statute, required to enter a copy of the record. (*Mahoney Mining Co. v. Bennett*, 4 Sawyer, 289, followed.) *Commercial & Savings Bank v. Corbett*, 5 Sawyer, 172.

34. No order of the state court accepting the petition and bond is necessary to remove a cause. *Ib.*

Removal. Proper District. Alabama.

1. (Oct., 1873.) Prior to the act of March 3, 1873, the District Court of the United States for the Middle District of Alabama was possessed of Circuit Court powers, and among these was the right to hear and decide cases properly removable from the state courts, within the limits of that district. *Ex parte State Ins. Co.*, 18 Wall. 417.

2. An order of a state court within those limits, ordering the removal of a case into the Circuit Court for the *Southern* District of Alabama, was therefore void; and that court was right in refusing to proceed in such case, when the papers were filed in it. *Ib.*

Removal. Alien a Party.

1. (March, 1872.) A case was removed into this court, under the twelfth section of the act of Sept. 24, 1789 (1 Stat. at Large, 79), on the allegation that the plaintiff was a citizen of New York, and the defendant a citizen of Massachusetts. The plaintiff moved to remand the cause, on the ground that he was an alien. That fact was not denied. *Held*, that the motion must be granted. *Galvin v. Boutwell*, 9 Blatchf. 470.

2. (Dec., 1873.) Under the provisions of the second section of the act of July 27, 1868 (15 Stat. at Large, 227), a suit commenced in a state court, against a corporation created under the laws of Great Britain, cannot be removed by it into this court. *Jones v. Oceanic Steam Navigation Co.*, 11 Blatchf. 406.

3. (May, 1878.) Where the defendant removed a suit into this court, under sec. 2 of the act of March 3, 1875 (18 Stat. at Large, 470), on the ground that the defendant was a Swiss corporation, and that the plaintiffs, three in number, were citizens of the State of New York, and it appeared that two of the plaintiffs were, when the suit was commenced, aliens and British subjects, and the third was a citizen of New York, the cause was, on the applications of the plaintiffs, remanded to the state court, on the ground that the requisite jurisdictional citizenship must exist as to each individual plaintiff. *Sawyer v. Switzerland Marine Ins. Co.*, 14 Blatchf. 451.

4. (April, 1879.) A citizen of the District of Columbia brought a suit, in a state court, against a subject of Great Britain. The defendant removed the case into this court, under sec. 2 of the act of March 3, 1875 (18 Stat. at Large, 470). *Held*, that, as the suit was not one between a citizen of a state and a foreign citizen or subject, it could not be removed. *Cissel v. McDonald*, 16 Blatchf. 150.

5. A citizen of the District of Columbia is not a citizen of a state. *Ib.*

6. (Feb., 1880.) Where one of the defendants in a suit is,

on the averments in the complaint in the state court, an unnecessary and improper party, and no real and actual party, and the plaintiff is an alien, and the other defendants are all citizens of various states of the United States, the case is one removable into this court under the first clause of sec. 2 of the act of March 3, 1875 (18 Stat. at Large, 470), where all such other defendants apply for the removal, and where there is a controversy between the alien and such citizens, which is the only controversy in the suit. *Cooke v. Seligman*, 17 Blatchf. 452.

7. (Oct., 1854.) 'A mere "declaration of intention" by an alien, under the naturalization laws of the United States, to become a citizen, &c., and to renounce all allegiance to a foreign, his natural sovereign, in a judicial point of view, is not sufficient, of itself, and without being perfected by an actual renunciation, to prevent such alien from being regarded as a "foreign citizen or subject," within the meaning of that clause of the Constitution which gives jurisdiction to the courts of the United States over controversies between the citizens of a state and "foreign citizens or subjects." This point ruled at *nisi prius*, in a special case, and with the expression of a readiness on the part of the court to hear it more solemnly argued. *Baird v. Byrne*, 3 Wall. Jr. 1.

8. (Oct., 1858.) To be able to remove a case from the state courts to the federal, under the twelfth section of the Judiciary Act of 1789, each defendant — no matter how numerous the defendants may be who have been properly served with process, or who voluntarily appear without having been so served — must be either an alien or a citizen of a state other than that of the state to which the plaintiff belongs. It is not enough that one defendant, or any — the largest number short of the whole — be so. *Ex parte Girard*, 3 Wall. Jr. 263.

9. If one defendant be an alien, and be properly served or be otherwise in court, and other persons, not aliens or citizens of a state or states other than that to which the plaintiff belongs, be named as defendants in the writ, but be not served, nor appear voluntarily, the alien defendant who is served may himself remove the case. Per GRIER, J. *Id.*

10. Where a plaintiff brings ejectment against several persons who hold by several and distinct titles, no doubt the court in which such process is issued may compel such plaintiff to discontinue and divide his action; and will not permit him, by joining

defendants thus claiming, to affect injuriously the rights of any. *Ib.*

11. (May, 1878.) Where a petition for the removal of a cause from a state to a federal court, under sec. 2 of the act of March 3, 1875 (18 Stat. 470), alleged as ground of removal, that there was in the suit a controversy between the plaintiff, who, when the suit was brought, was an alien, and the defendant, who was a citizen of the state where the suit was brought, — *Held*, that the ground alleged was sufficient, and that the fact that the plaintiff, after the suit was brought, had become a citizen of the United States, did not prevent the removal of the cause. *Houser v. Clayton*, 3 Woods, 273.

12. (March, 1876.) A part of a controversy only cannot be removed, but the case must be so removed that it can be wholly determined. *Hervey v. Railway Co.*, 7 Biss. 103.

13. Foreign citizens, where they do not constitute the entire plaintiff or defendant, cannot remove a suit, as the suits contemplated by the act of March 3, 1875, are those between citizens of one of the states of the Union, on one side, and foreign citizens or subjects on the other. *Ib.*

14. Where parties are merely nominal and have no actual interest, then their citizenship will not affect the question of removal. *Ib.*

15. (1874.) A corporation created by the laws of Great Britain is an "alien," within the meaning of sec. 12 of the Judiciary Act of 1789 (1 Stat. 79), and when sued by a citizen of the United States, in the state court, may, on complying with the requirements of that section, have the suit removed to the proper Circuit Court of the United States. *Terry v. The Imperial Fire Ins. Co.*, 3 Dill. 408.

16. (1876.) Citizenship and the right to vote are neither identical nor inseparable; and the Constitution of Minnesota, although it authorizes resident unnaturalized foreigners to vote at state elections and hold office, does not make them citizens of the state; and such persons may remove causes to the Circuit Court of the United States, on the ground that they are aliens, although they have resided in the state for many years and voted at elections, as authorized by the state constitution, or held office under the laws of the state. *Lanz v. Randall*, 4 Dill. 425.

17. (June, 1880.) A suit brought in a court of the State of

Nevada, by a citizen of California against a citizen of England, may be removed into the Circuit Court of the United States, under the act of March 3, 1875. *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, 6 Sawyer, 471.

Removal. Citizenship. Twelfth Section of the Judiciary Act of 1789.

1. (Jan., 1840.) An action was brought by foreign attachment, in the Court of Common Pleas of Warren County, Pennsylvania, in the name of a citizen of Pennsylvania, for the use of the Lumberman's Bank at Warren, Pennsylvania, against a citizen of New York. The suit was on a note given by the defendant to the plaintiff, to be paid "in the office notes of the Lumberman's Bank at Warren." Some of the stockholders of the Lumberman's Bank at Warren were citizens of the State of New York. The defendant appeared to the action, by counsel, and, having given bond with surety to the Court of Common Pleas, removed the cause to the Circuit Court of the United States for the Western District of Pennsylvania. A motion was made in the Circuit Court, to remand the cause to the Court of Common Pleas of Warren County, the Circuit Court having no jurisdiction of the cause, on the ground that the real party in the suit was the Lumberman's Bank at Warren, an aggregate corporation, some of the stockholders of the bank being citizens of the State of New York. It was held, that the Circuit Court had jurisdiction of the case. *Irvine v. Lowry*, 14 Pet. 293.

2. The decisions of the Supreme Court have been uniform, and as declared at the present term, in the case of *The Commercial and Railroad Bank of Vicksburg v. Slocumb et al.*, that the courts of the United States cannot exercise jurisdiction when some of the stockholders in a corporation established in one state are citizens of another state, of which the party sued by the corporation is a citizen. *Id.*

3. (Dec., 1855.) Where a bill in chancery was filed in a state court, by a citizen of that state, against parties, some of whom resided in that state and some in another state, and the latter removed the cause into the Circuit Court of the United States; and the court, after answer filed, remanded it to the state court, this order was, under the circumstances of the case, erroneous. *Wood v. Davis*, 18 How. 467.

4. The real parties in interest were those who resided out of the state. The circumstance that other and formal parties were joined with them in the bill, cannot oust the federal courts of jurisdiction. *Ib.*

5. (Dec., 1867.) A suit removable from a state court under the twelfth section of the Judiciary Act must be a suit regularly commenced by a citizen of the state in which the suit is brought, by process served upon a defendant who is a citizen of another state. *West v. Aurora City*, 6 Wall. 139.

6. Hence no removal can be made of a defense or answer, though of such a character as that, under statute of the state, it becomes, by a discontinuance of the original suit itself, a proceeding that may go on to trial and judgment, as if, in some sense, an original suit. *Ib.*

7. (Dec., 1869.) It would seem that the restriction in the eleventh section of the Judiciary Act, giving original jurisdiction of the Circuit Courts, and which provides that they shall not "have cognizance of any suit to recover the *contents* of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said *contents*, if no assignment had been made," applies only to rights of action founded on contracts which contain within themselves some promise or duty to be performed, and not to mere naked rights of action founded on some wrongful act, or some neglect of duty to which the law attaches damages. *Bushnell v. Kennedy*, 9 Wall. 387.

8. However this may be, the restriction of the eleventh section not being found in the language of the twelfth, and the reasons for its being in the eleventh section not existing for its being in the twelfth, it is not to be considered as applying to cases transferred from state courts to the Circuit Court under this latter section. *Ib.*

9. (Oct., 1847.) If a citizen of another state is sued in Massachusetts by a citizen of the latter state, in her Court of Common Pleas, the action may be removed to the Circuit Court of the United States, though it does not appear on the face of the writ that the defendant is a citizen of another state. *Ladd v. Tudor*, 3 Woodb. & M. 325.

10. (Oct., 1853.) Where one of two plaintiffs in a suit originally commenced in a state court, and removed by the defendant

into this court, under the twelfth section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 79), was a citizen of New Hampshire, and the other was a citizen of Vermont, and the defendant was a citizen of New York,— *Held*, that this court had no jurisdiction of the case; that it could not be removed into this court; and that it must be remanded to the state court. *Hubbard v. Northern Railroad Co.*, 3 Blatchf. 84.

11. To authorize the removal, all the plaintiffs must be citizens of the state in which the suit is brought, and all the defendants must be citizens of some other state or states. *Ib.*

12. (Nov., 1853.) Where, in a case removed into this court under the twelfth section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 79), the defendant is a foreign corporation, this court has jurisdiction of the case, although no suit can be commenced in this court by original process against a foreign corporation. *Bliven v. New England Screw Co.*, 3 Blatchf. 111.

13. (Nov., 1862.) A suit commenced by summons in a state court of New York, under the one hundred and thirty-fifth section of the Code of Procedure of that state, against a foreign corporation having property in that state, followed by a warrant of attachment issued under sec. 227 and the following sections of the same Code, against the property of the defendants in that state, and duly served by attaching property, is “a suit,” within the meaning of the twelfth section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 79), providing for the removal of suits into this court. *Barney v. Globe Bank*, 5 Blatchf. 107.

14. This court has jurisdiction of such a suit, if properly removed, although it could not, by reason of the provision of the eleventh section of the same act, have compelled the defendants, by compulsory process, to submit to its jurisdiction in a suit originally brought against them in this court. *Ib.*

15. Such a suit can be removed by a foreign corporation under the provision of the said twelfth section, which gives the right of removal to a defendant who is a citizen of another state than that in which the suit is brought. *Ib.*

16. (April, 1868.) A corporation created by a state other than the State of New York does not, by reason of its having an office and transacting material branches of its business within the State of New York, or by force of the state statute of New York of April 10, 1855 (Laws of 1855, ch. 279), lose the privilege,

which otherwise belongs to it, as a corporation created by another state, of having all its members regarded as citizens of that state, within the meaning of the acts of Congress in regard to the removal of causes into the Circuit Courts of the United States. *Hatch v. Chicago, Rock Island, & Pacific Railroad Co.*, 6 Blatchf. 105.

17. A suit brought in a state court of New York, by a citizen of New York, against a corporation created by a state other than New York, and against a citizen of a state other than New York, and against other defendants who are citizens of New York, cannot be removed into a Circuit Court of the United States in New York, under the twelfth section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 79), unless the defendants who are citizens of New York are merely nominal parties to the suit. *Ib.*

18. A plaintiff cannot, by joining, as nominal defendants, with a corporation persons who are citizens of the same state with the plaintiff, deprive the corporation of any right which it would otherwise have in respect to removing a cause into a court of the United States. *Ib.*

19. (Oct., 1868.) Where a suit is brought in a state court, and is duly removed into this court, by the defendant, under the twelfth section of the act of Sept. 24, 1789 (1 Stat. at Large, 79), the question of the jurisdiction of this court is not dependent upon any of the provisions of the eleventh section of that act. *Winans v. Railroad & Navigation Co.*, 6 Blatchf. 215.

20. (Oct., 1858.) In ejectment, under the now usual American form, in which the fictitious lease, &c., is abolished, — where the tenant in possession, who has been served as defendant, does not fall within the description of persons authorized to remove a case from the state courts to the federal, but the landlord, who has not been made a party, does so fall, such landlord cannot, by any means that under existing laws can be devised, remove the case from the state court into the federal. He can get into the suit at all only by appearing voluntarily and taking defense, and when he does this he connects himself inseparably with his incapable tenant, and becomes himself incapable. The tenant in possession being, if sued and served, a proper and necessary party, the landlord, by appearing and taking defense (which he may do and become *dominus litis*), cannot yet have this tenant struck off the record, and so, being now alone, exercise the right which,

if he had been originally the only defendant, he might have exercised; nor yet can he sever himself from his tenant, leaving the tenant still on the record and in state jurisdiction, while he, the landlord, comes himself and has the title tried in a federal court. *Ex parte Turner*, 3 Wall. Jr. 258.

21. If tenants in common, some of whom belong to a state in which the suit is brought, while others do not so belong, sue a party who does not so belong, such defendant, it seems, cannot remove the case at all. He cannot remove it for the whole land sued for, because each of the parties suing is not a citizen of the state in which the suit is brought; and he cannot remove it for the parts claimed by those of the plaintiffs who are such citizens, because the federal court will not thus divide an action not yet before it into parts for the sake of obtaining jurisdiction over one of them, nor can its process be so framed as to order a state court to send to the federal court a fraction only of a cause pending on the lists. *Ib.*

22. (May, 1848.) A suit cannot be removed from a state court into the Circuit Court of the United States, where a part of the plaintiffs or defendants are citizens of the state where the suit is brought and others of some other state. *Wilson v. Blodget*, 4 McLean, 363.

Removal. Citizenship. Act of July 27, 1866.

1. (Oct. 1874.) Though statute may enact that a trustee to whom property is assigned in trust for any person, "before entering upon the discharge of his duty, shall give bond" for the faithful discharge of his duties, his omission to give such bond does not divest the trustee of a legal estate once regularly conveyed to him.

Accordingly, when A., of one state, mortgages by way of trust deed to B., of another, lands in that other in trust for C., of this same other state, authorizing B., upon default in the payment of the mortgage debt, to take possession of the mortgaged premises and sell them upon certain specified conditions, B. is a necessary party in any proceedings in the nature of foreclosure; though by statute of the state B. may have been required to give bond such as above mentioned, and may not have given it. And if C., the creditor, have filed a bill for foreclosure against A. and B., A.

cannot transfer the case from the state court to the Circuit Court under the act of July 27, 1866. The suit is not one in which there can be a final determination of the controversy, so far as it concerns *him*, without the presence of B., to whom the trust deed was made. *Gardner v. Brown*, 21 Wall. 36.

2. (1874.) Under the act of July 27, 1866 (14 Stat. 306), as to the removal of suits from a state court into the federal court, it is sufficient, *it seems*, as respects citizenship, that the defendant applying for the removal is, at the time of filing his petition therefor, a citizen of another state, and the plaintiff a citizen of the state in which the suit is brought. *McGinnity v. White*, 3 Dill. 350.

Removal. Citizenship. Act of March 2, 1867.

1. (Dec., 1871.) A statute of Wisconsin provides that "when- ever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; *provided, that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same.*" Held, that the proviso requiring the action to be brought in a court of the state does not prevent a non-resident plaintiff from removing the action, under the act of Congress of March 2, 1867, to a federal court and maintaining it there. *Railway Co. v. Whitton*, 13 Wall. 270.

2. Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a federal court, in a case between proper parties, is a matter of course, and the jurisdiction of the court in such case is not subject to state limitation. *Ib.*

3. (Dec., 1871.) The restriction of the eleventh section of the Judiciary Act, giving original jurisdiction to the Circuit Courts, but providing that they shall not "have cognizance of any suit to recover the contents of any promissory note or *other chose in action*, in favor of an assignee, unless a suit might have

been prosecuted in such court to recover the said contents, if no assignment had been made," does not apply to cases transferred from state courts, under the act of March 2, 1867, giving to either party in certain cases a right to transfer a suit brought in a state court, where either makes affidavit, &c., "that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such court."

City of Lexington v. Butler, 14 Wall. 282.

4. (Oct., 1873.) A case in which the plaintiff is a citizen of the state where the suit is brought and two of the defendants are citizens of other states, a third defendant being a citizen of the same state as the plaintiff, is not removable to the Circuit Court of the United States under the act of March 2, 1867, upon the petition of the two foreign defendants. *Case of the Sewing Machine Companies*, 18 Wall. 553.

5. (Oct., 1874.) A suit in a state court against several defendants, in which the plaintiff and certain of the defendants are citizens of the same state, and the remaining defendants are citizens of other states, cannot be removed to the Circuit Court under the act of March 2, 1867. *The Case of the Sewing Machines* (18 Wallace, 553) affirmed. *Vannevar v. Bryant*, 21 Wall. 41.

6. (Oct., 1875.) The act of Congress of March 2, 1867 (14 Stat. 558), in authorizing and requiring the removal to the Circuit Court of the United States of a suit pending, or afterwards brought in *any* state court, involving a controversy between a citizen of the state where the suit is brought and a citizen of another state, thereby invests the Circuit Court with jurisdiction to pass upon and determine the controversy, when the removal is made, though that court could not have taken original cognizance of the case. *Gaines v. Fuentes*, 2 Otto, 10.

7. (Oct., 1876.) Under the act of March 2, 1867 (14 Stat. 558), a suit pending in a state court, between a citizen of the state in which the suit was brought, and a citizen of another state, could not, on the application of the former, be removed to a Circuit Court of the United States. *Hurst v. Western & Atlantic Railroad Co.*, 3 Otto, 71.

8. (Aug., 1873.) Under the act of March 2, 1867 (14 Stat. 558), a suit brought in a state court may be removed to the Circuit Court of the United States, by a defendant who is a citizen

of a different state from that in which the suit is brought, although there are other defendants who are citizens of the state in which it is brought. *Florence Co. v. Grover & Baker Co.*, 1 Holmes, 235.

9. (Nov., 1877.) To warrant the removal of a cause from a state to a federal court, under the act of March 2, 1867, it is not necessary that the parties should have been citizens of different states when the petition for removal was filed. *Cook v. Whitney*, 3 Woods, 715.

10. (Feb., 1869.) Where in the state court all the defendants except some who were residents of the state in which the suit was brought, had confessed the bill, the fact that some of the co-defendants were residents of another state does not prevent this court from taking jurisdiction [on removal]. *Akerly v. Vilas*, 2 Biss. 110.

11. (May, 1869.) A voluntary change of residence by a party, so that jurisdiction on account of citizenship arises, even if made after the suit was brought, does not affect the right of removal. *Johnson v. Monell*, Woolw. 390.

12. It is only a question of costs, as a plaintiff, after his voluntary change of residence, might discontinue in the state court, and bring his action in the federal court. *Ib.*

13. The intent with which a person removes from the state, in the court of which a suit is pending to which he is a party, so that by reason of citizenship the federal court may have jurisdiction, and he be enabled to remove the cause thereto, is not an objection to the removal, provided his citizenship in another state be real. *Ib.*

14. (1870.) A non-resident plaintiff, who brings his action at law in a state court against a citizen of the state in which the suit is brought and a citizen of another state, the latter of whom voluntarily appears, is entitled, by complying with the act of Congress of March 2, 1867 (14 Stat. 558), to have the cause removed, as to all the defendants, to the proper Circuit Court of the United States. *Sands v. Smith*, 1 Dill. 290.

15. The various acts of Congress relating to the removal of causes from the state to the federal courts, discussed by DILLON, Circuit Judge. *Ib.*

16. (1870.) Under the act of March 2, 1867 (14 Stat. 558), where the suit in the state court is brought by copartners on a

firm demand, the defendants are not entitled to have the same removed to the federal court, on filing a petition and affidavit showing that a part of the plaintiffs are citizens of the state in which the suit is brought and the defendants are citizens of another state. In such case, in order to authorize the removal, all of the plaintiffs should be shown to be citizens of the state in which the suit was brought. *Case v. Douglas*, 1 Dill. 299.

17. (1871.) In an action of replevin commenced in the state court, by a resident citizen, against a sheriff who had seized goods at the instance of non-resident creditors, the latter, under a statute of the state, by the order of the state court, were substituted as defendants "in lieu" of the sheriff, who was discharged from liability. *Held*, that, being thus made sole defendants, the non-resident creditors were entitled, on filing the requisite petition, to have the cause removed to the proper federal court. *Beecher v. Gillett*, 1 Dill. 308.

18. (1874.) Corporations are within the act of March 2, 1867 (14 Stat. 558), in respect to the removal of causes from state to federal courts, and on petition, and the making by the proper officer of the corporation of the required affidavit, are entitled to the benefit of the act. *Trust Co. v. Maquillan*, 3 Dill. 379.

Removal. Citizenship. Act of March 3, 1875.

1. (Oct., 1879.) The provision in the first clause of the second section of the act entitled "An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," approved March 3, 1875 (18 Stat. part 3, p. 470),—"that any suit of a civil nature, at law or in equity, now pending . . . in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, . . . in which there shall be a controversy between citizens of different states, . . . either party may remove said suit into the Circuit Court of the United States for the proper district,"—construed, and *held* to mean that, when the controversy about which a suit in the state court is brought is between citizens of one or more states on one side and citizens of other states on the other side, either party to the controversy may remove the suit to the Circuit Court, without regard to the position they occupy in the pleadings as plaintiffs or defendants.

For the purposes of a removal, the matter in dispute may be ascertained, and according to the facts the parties to the suit arranged on opposite sides of that dispute. If, in such an arrangement, it appears that those on one side, being all citizens of different states from those on the other, desire a removal, the suit may be removed. *Removal Cases*, 10 Otto, 457.

2. (Oct., 1879.) The ruling in *Removal Cases* (100 U. S. 457) on the second section of the act of March 3, 1875 (18 Stat. part 3, 470), stated, and declared to be applicable to the jurisdiction of the Circuit Court, as the same is prescribed by the first section of that act. *Pacific Railroad v. Ketcham*, 11 Otto, 289.

3. (Oct., 1880.) A final decree of the proper state court dissolved an insolvent life insurance company of Missouri, and, as provided by the statutes in force, vested, for the use and benefit of creditors and policy-holders, its entire property in A., a citizen of that state and superintendent of her insurance department. *Held*, . . . 2. That a suit having been previously instituted in a court of Louisiana by citizens of the latter state against the company, A. was, on being admitted a party thereto, entitled, by reason of his citizenship, to remove it to the Circuit Court of the United States. *Relfe v. Rundle*, 13 Otto, 222.

4. (Oct., 1880.) A., a citizen of Louisiana, filed a bill in a court of that state praying for an injunction to restrain B., who had recovered judgment against C. in that court, and sued out thereon a *fiery facias*, from levying the writ upon a tract of land whereof A. was the owner and actual possessor by a good and valid title from C. The judgment declares that an authentic act of mortgage, executed by C., and covering that and other tracts, was rendered executory, and that all the lands should be seized to satisfy it. The act was not reinscribed. A. was not a party to the judgment, nor was any demand made of, or notice given to him. B. was a citizen of Mississippi, and filed a petition for the removal of the suit. *Held*, that, the amount in controversy being sufficient, the suit was removable, under the act of March 3, 1875, c. 137 (18 Stat. part 1, p. 470). *Bondurant v. Watson*, 13 Otto, 281.

5. (Oct., 1880.) A., a citizen of Massachusetts, commenced a suit in a court of that state against the executors of B., two of whom were citizens of Massachusetts and one a citizen of New York, to enforce a liability of the testator. The executors ap-

peared and filed a joint answer. *Held*, that the controversy, not being divisible, nor wholly between citizens of different states, could not be removed into the Circuit Court of the United States. *Blake v. McKim*, 13 Otto, 336.

6. (June, 1876.) Citizens of New York brought an action of trover, in a state court, against a citizen of New York and citizens of Connecticut. All the defendants took proceedings to remove the suit into this court, under the second section of the act of March 3, 1875 (18 Stat. at Large, 470), as being a suit in which there was "a controversy between citizens of different states." *Held*, that the controversy in the suit was not one between citizens of different states, and that the cause must be remanded to the state court. *Petterson v. Chapman*, 13 Blatchf. 395.

7. The only changes introduced by this part of the second section of the act of 1875 are, that either party, plaintiff or defendant, may remove the cause, and that it is no longer necessary that either party shall be a citizen of the state in which the suit is brought; but it still remains necessary that the state citizenship of each individual plaintiff shall be different from the state citizenship of each individual defendant, to authorize a removal under this part of said section. *Ib.*

8. (June, 1878.) A suit in which the plaintiff is a citizen of New York, and three of the defendants are citizens of New York, and one defendant is a citizen of Ohio, and one defendant is a citizen of Indiana, and none of the parties are nominal parties, cannot be removed into this court, under the act of March 3, 1875 (18 Stat. at Large, 470). *Van Brunt v. Corbin*, 14 Blatchf. 496.

9. (Dec., 1879.) In determining, under the first clause of sec. 2 of the act of March 3, 1875 (18 Stat. at Large, 470), whether a suit is one in which there is a controversy between citizens of different states, the condition of the controversy when the petition for removal is filed is what is to be considered, and not its condition at a subsequent time. There must be a controversy between citizens of different states when the petition is filed, and all the parties on one side of such controversy must unite in the petition for removal, and they must all then be of different state citizenship from any of the parties on the other side of such controversy. *Chicago, St. Louis, & New Orleans Railroad Co. v. McComb*, 17 Blatchf. 371.

10. A corporation defendant, which is not a real or actual or necessary party, but is a merely formal party, to the controversy in the suit, as such controversy stands when the petition for removal is filed, is to be considered as not a party. *Ib.*

11. The controversy is to be judged of in part by the pleadings, if any, which had been put in, in the state court, before the filing of the petition for removal. *Ib.*

12. (March, 1880.) In an action of ejectment, in a state court, against three defendants, two of them, being citizens of New York, made default. The third answered, and the cause was at issue. More than ten months afterwards, the third, being a citizen of Pennsylvania, petitioned for the removal of the cause into this court. The plaintiff was a citizen of Massachusetts. *Held*, — (1.) The removal was not one provided for by subdivision 2 of section 639 of the Revised Statutes, because the plaintiff was not a citizen of New York. *Forrest v. Keeler*, 17 Blatchf. 522.

13. (April, 1880.) M., as the widow of B., sued a savings bank, in the state court, to recover moneys which B. had on deposit in the bank at the time of his death. Under sec. 25 of the act of the Legislature of New York, passed May 17, 1875 (Laws of New York, 1875, ch. 371, p. 408), that court, on the petition of the bank, made L., as executor of B., a party defendant to the suit, as a claimant of the same money. The money was not paid into the court, but remained in the bank. L. took steps to remove the case into this court. He was a citizen of Connecticut. M. and the bank were citizens of New York. On the application of M., this court remanded the case to the state court. *Bailey v. The New York Savings Bank*, 18 Blatchf. 77.

14. The bank was a necessary party to the suit of M., so long as it retained the money, and the case was not removable under either subdivision of sec. 2 of the act of March 3, 1875 (18 Stat. at Large, 470). *Ib.*

15. (July, 1877.) Congress has conferred jurisdiction on the United States courts, as to suits against non-residents, commenced in the state courts by attachment, and removed into United States courts, by secs. 2 and 4 of the act of March 3, 1875, "to determine the jurisdiction of the Circuit Courts of the United States, &c., &c." *United States v. Ottman*, 1 Hughes, 313.

16. (May, 1877.) The law of Virginia, contained in secs. 19 and 36 of ch. 37 of the Code of 1873, does not affect the right

of a foreign insurance company which complies with its terms to move for a removal of a cause, in which it is a party, from the state to the United States Circuit Court, under sec. 639 of the Revised Statutes of the United States and its amendments. *Owen v. New York Life Ins. Co.*, 1 Hughes, 322.

17. (Nov., 1875.) The fact that defendants, in a cause pending in a Louisiana state court, have called in warranty parties who are citizens of the same state with the plaintiffs, furnishes no good ground against the removal of that part of the cause which concerns the original parties, notwithstanding the fact that the statute of Louisiana declares that the trial of the call in warranty cannot be separated from the trial of the main issue. *Ellerman v. Railroad Co.*, 2 Woods, 120.

18. (May, 1878.) The fact that some of the defendants in a cause pending in a state court are citizens of the same state with the plaintiff, is not an obstacle to the removal of the cause to the federal court, if such defendants are merely formal, and not necessary parties. *Edgerton & Doane v. Gilpin*, 3 Woods, 277.

19. (Nov., 1879.) Where a contract between citizens of the same state, even though the contract is neither a promissory note, negotiable by the law merchant, nor a bill of exchange, has been assigned by one of the parties to the same to a citizen of another state, who has brought suit thereon in a court of the state of which the defendant is a citizen, the suit may be removed to the United States Circuit Court of the proper district, by virtue of the act of March 3, 1875 (18 Stat. 470). *Waterbury & Co. v. City of Laredo*, 3 Woods, 371.

20. (April, 1877.) Under the act of March 3, 1875, if some of the plaintiffs and some of the defendants to a suit are citizens of the same state, the removal of the cause must be sought by all the plaintiffs or all the defendants. *Girardey v. Moore*, 3 Woods, 397.

21. But if all the plaintiffs on the one hand, and all the defendants on the other, are citizens of different states, then any one or more of either may remove the cause. *Ib.*

22. Under the said act of March 3, 1875, the whole suit must be removed, or no removal can take place. *Ib.*

23. The said act of March 3, 1875, does not repeal that part of the act of July 27, 1866 (14 Stat. 306), which authorizes one defendant, if a citizen of another state, to separate his case from that of the other defendants, who are citizens of the

state where the suit is brought, and to remove it to the federal court. *Ib.*

24. (Nov., 1877.) Garnishees are not parties to the suit. The fact that the plaintiff and the garnishees are citizens of the same state, is no obstacle to the removal of a case from the state to the federal court. *Cook v. Whitney*, 3 Woods, 715.

25. (Oct., 1875.) Where the real controversy is between a city and one of its citizens, a citizen of another state claiming to be interested in the subject-matter of the litigation has not the right to remove the suit from the state into the federal court. *City of Chicago v. Gage*, 6 Biss. 467.

26. (July, 1877.) In the removal of a cause from a state to a federal court, the whole suit must be removed. A fragment of a suit cannot come to the federal court for trial, because a party interested in that fragment, or some single issue, is a citizen of another state from that of the plaintiff. *Carraher v. Brennan*, 7 Biss. 497.

27. A removal will only be allowed when the controversy is so completely between residents or citizens of different states, that its termination will settle the whole suit. *Ib.*

28. It is not enough that citizens of different states are interested in the same issue or controversy, but they must have such an interest that, when the question to which they are parties is settled, the suit is thereby determined; otherwise the right of removal is not given. *Ib.*

29. (1877.) The plaintiff, a citizen of Colorado, brought a stockholder's bill in a state court in Colorado, making the defendants thereto the railroad company (also a citizen of Colorado), in which the plaintiff was a stockholder, viz. the Denver Pacific Railway Company, and also the directors thereof, including two directors, citizens of Colorado, against whom, however, no charges were made, and no relief asked; also making a defendant another railroad company, viz. the Kansas Pacific Railway Company (a citizen of Kansas), and certain individuals, all citizens of other states than Colorado. The object of the bill was to secure an accounting in favor of the Denver Pacific Company against the Kansas Pacific Company, and to secure a decree *in personam* against the non-resident directors of the Denver Pacific Company. The Kansas Pacific Company, and the individual defendants connected with that company, without being joined with the

other defendants, applied to remove the suit to the Circuit Court of the United States, under the act of March 3, 1875. *Held*, that the suit was removable. *Arapahoe County v. Railway Co.*, 4 Dill. 277.

30. The right of removal cannot be defeated by the joinder as defendants of citizens of the same state with the plaintiff, if no relief is prayed against them, and they are made defendants without any right or reason or just cause. *Ib.*

31. In a stockholder's bill of the kind before the court, the company in which the plaintiffs are stockholders is a necessary party defendant, but the interests of the stockholders and the company are identical, and they represent one side of the controversy, and the company against whom the accounting and relief are sought represents the other. *Ib.*

32. The removal act of March 3, 1875, provides that the suit — the whole suit, and not a part of the suit — shall be removed; and under that act, if the requisite conditions exist, any one of the plaintiffs or defendants may remove the suit and carry the other parties with them. *Ib.*

33. (1876.) A foreclosure suit by trustees in a railway mortgage, who are citizens of Massachusetts, was commenced in one of the state courts in Iowa, against the debtor company, which is an Iowa corporation, making an Illinois and an Indiana corporation, each of which claimed liens upon the property, also defendants to the bill. This suit, after all of the defendants had answered, was removed in 1876 to the Circuit Court of the United States for the District of Iowa, upon petition of the plaintiffs, under the act of 1867 (Rev. Stats. s. 639, subd. 3). The debtor corporation moved to remand the same to the state court, because all of the defendants were not citizens of the state in which the suit was brought. *Held*, inasmuch as the case was one clearly within sec. 2 of the act of March 3, 1875, in respect of removals, and the controversy one in relation to the priority of liens between citizens of different states, that the Circuit Court had jurisdiction, and that it should not be remanded. *Burnham v. Railroad Co.*, 4 Dill. 503.

34. (July, 1880.) In order that a suit may be removed by either party, under sec. 2 of the act of March 3, 1875, all persons forming the party on one side of the controversy must be citizens of states different from those of which the other party are citizens. *Ruble v. Hyde*, 1 McCrary, 513.

35. (May, 1879.) A suit against tenants in common, or persons claiming to be such, concerning the title to or possession of land, is divisible and removable into the national court, under sec. 639 of the Revised Statutes, by either of said tenants so far as he is concerned. *Goodenough v. Warren*, 5 Sawyer, 494.

36. The complainants brought suit in the state court against W., a citizen of California, to quiet title to certain lands, and joined with him as defendants certain citizens of Oregon, from whom W. derived whatever right or title to the premises he has. *Held*, that the substantial controversy in the suit was wholly between citizens of different states, — the complainants and W., — and might therefore, under sec. 2 of the act of March 3, 1875 (18 Stat. 470), be wholly removed by the latter into the national court. *Ib.*

Removal. Prejudice or Local Influence. Affidavit.

1. (Dec., 1871.) The act of March 2, 1867, amending the act of July 27, 1866, "for the removal of causes in certain cases from state courts," by which amendatory act it is provided that in suits then pending, or which might be subsequently brought in a state court, "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of \$500, exclusive of costs," the suit may be removed to a federal court upon petition of the non-resident party, whether plaintiff or defendant, at any time before final hearing or trial, upon making and filing in the state court "an affidavit stating that he has reason to, and does, believe that, from prejudice or local influence, he will not be able to obtain justice in such state court," is constitutional and valid. *Railway Co. v. Whitton*, 13 Wall. 270.

2. (Oct., 1873.) The act of Congress of March 2, 1867, allowing either of the parties to a suit — they being of a certain class described — to remove it from a state court into the Circuit Court of the United States, does not change the previously existing and settled rules which determine who are to be regarded as plaintiff and defendant. *Knapp v. Railroad Co.*, 20 Wall. 117.

3. Hence, where two persons in one state, trustees, for bondholders, of a mortgage of a railroad owned by a company in

another, foreclosed the mortgage, bought in the road in trust for the bondholders, and then leased it to a citizen of a state to which they themselves belonged, and then a majority of the bondholders in the state where the original company was, in pursuance of a statute there, formed themselves into a new corporation, to which the statute gave ownership and control of the road, and suit was brought in a state court against the lessee of the road by the trustees who had made the lease,—*Held*, that the defendant could not remove the suit from the state court to the federal court, on the ground that it was wholly between the new corporation and the lessee, and that the trustees were now merely nominal parties; they, the trustees, not having been discharged from, or in any way incapacitated from executing, their trust, and there having been, in fact, unpaid bondholders who had not joined in the creation of the new corporation, and who had yet a right to call on the trustees to provide for the payment of their bonds. *Id.*

4. (Oct., 1879.) A party is not entitled to the removal of a suit from a state court into the Circuit Court, on account of prejudice or local influence, unless the adverse party is a citizen of the state in which the suit was brought. *Bible Society v. Grove*, 11 Otto, 610.

5. (June, 1870.) Where a suit is sought to be removed into this court from a state court, under the act of March 2, 1867 (14 Stat. at Large, 558), the affidavit which is, by that act, required to be made and filed in the state court, must, at least in the absence of any controlling statute of the United States, be taken and certified in such manner as the state law requires in respect to the taking and certifying of affidavits to be received and used in the courts of the state. *Bowen v. Chase*, 7 Blatchf. 255.

6. If such an affidavit purports to be taken and certified in conformity with the provisions of the state statute of New York of April 7, 1869 (Laws of New York, of 1869, ch. 133), it must have attached to it such a certificate as is required by the second section of that statute. *Id.*

7. Where such an affidavit was entitled, "In the Supreme Court of the State of New York," followed by the names of the parties at full length, and stated that the affiant "is one of the plaintiffs in the suit above entitled, and that he has reason to believe and does believe, that, from prejudice and local influence,

he will not be able to obtain justice in this court," — *Held*, that such affidavit was a substantial compliance with the provision of the said act of 1867, requiring the party to make an affidavit, stating "that he has reason to, and does, believe that, from prejudice or local influence, he will not be able to obtain justice in such state court." *Ib.*

8. (June, 1876.) *Quære*: Whether subdivision 3 of section 639, U. S. Revised Statutes, allowing the removal of causes from the state to the United States courts, on the ground of *prejudice* and *local influence*, has been repealed by the act of March 3, 1875. *Gurnee v. County of Brunswick*, 1 Hughes, 270.

9. (April, 1872.) The act of Congress of 1867, which authorizes the removal of suits from state courts to the United States courts, either by the plaintiff or the defendant, who shall make oath that he cannot have a fair trial on account of local prejudice and influence, overrides the provision of the eleventh section of the Judiciary Act [of 1789], which declares that those courts shall not have cognizance of any suit to recover the contents of any note or other chose in action in favor of an assignee, unless suit might have been prosecuted in such court to recover said contents, if no assignment had been made. *Barclay v. The Levee Commissioners*, 1 Woods, 254.

10. The provision of the eleventh section of the Judiciary Act, in regard to suits in the United States courts, on notes or other choses in action held by assignment, was intended to prevent fraudulent assignments of choses in action, made for the purpose of giving the court jurisdiction, and was not founded on any constitutional principle. *Ib.*

11. (May, 1869.) Under the provisions of the twelfth section of the Judiciary Act (1 Stat. 79), the right of removal was granted only to a defendant who was an alien, or a citizen of a state other than that in which the suit was brought. *Johnson v. Monell*, Woolw. 390.

12. It was incumbent on the defendant to claim the right at the time of entering his appearance in the state court. *Ib.*

13. The act of March 2, 1867 (14 Stat. 558), allows to a plaintiff, as well as to a defendant, the right of removal, and he may exercise it at any time in the course of the litigation prior to final hearing or trial. *Ib.*

14. The only conditions on which the right depends are: —

(1.) That the controversy shall be between a citizen of the state in which the suit is brought, and a citizen of another state.

(2.) That the matter in dispute exceeds \$500, exclusive of costs.

(3.) That the non-resident citizen shall file an affidavit stating that he believes, and has reason to believe, that, from prejudice or local influence, he will not be able to obtain justice in the state court.

(4.) That he give the requisite security for his appearance and filing copy of the record in the federal court at the proper time. *Ib.*

15. The sentence in the Constitution which confers on the federal courts jurisdiction of causes arising under the Constitution and laws of the United States, confers on the same courts jurisdiction over causes between citizens of different states. The terms are as broad in one case as in the other. *Ib.*

16. Under the twenty-fifth section of the Judiciary Act, ever since the organization of the federal judiciary system, jurisdiction has been exercised over the former class of cases, after the final judgment in the highest court of the state. *Ib.*

17. If that has been rightful, then the right of removal at any stage of a cause must be rightful. *Ib.*

18. (1873.) Where a case is made for removal of a cause, under the act of July 27, 1866, the petitioner therefor is not obliged to make an affidavit [of the existence of prejudice or local influence], such as is required by the act of March 2, 1867. *Allen v. Ryerson*, 2 Dill. 501.

19. (1873.) A suit cannot be removed by the plaintiff, as to one of several necessary defendants. *Waggener v. Cheek*, 2 Dill. 560.

REVISED STATUTES.

Removal of Suits against Corporations organized under a Law of the United States.

SEC. 640. Any suit commenced in any court other than a Circuit or District Court of the United States, against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof as such member, for any alleged liability of such corporation, or of such member, as a member thereof, may be removed, for trial, in the Circuit Court for the district where such suit

is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section.

27 July, 1866, c. 288, s. 1, v. 14, p. 306.

27 July, 1868, c. 255, s. 2, v. 15, p. 227.

1. (April, 1869.) The twelfth section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 79), and the act of July 27, 1866 (14 id. 306), and the act of March 2, 1867 (id. 558), are statutes where the right to remove a case from a state court, into a court of the United States, is made to depend upon citizenship or alienage. *Fisk v. Union Pacific Railroad Co.*, 6 Blatchf. 362.

2. The act of March 2, 1833 (4 Stat. at Large, 632, 633), and the act of March 3, 1863 (12 id. 755, 756), and the act of July 27, 1868 (15 id. 226, 227), are statutes where the right so to remove a case is made to depend upon subject-matter. *Ib.*

3. The act of July 27, 1868, is constitutional. *Ib.*

4. Under the act of March 2, 1833, and the act of March 3, 1863, and the act of July 27, 1868, the entire suit is removed if any part of it is removed. *Ib.*

5. The second section of the act of July 27, 1868, construed, as to what suits are removable under it, and at whose instance, and what is the mode of removal. *Ib.*

6. (Feb., 1871.) Where a petition for the removal of a suit into this court, under the act of July 27, 1868 (15 Stat. at Large, 226), avers that the suit has been brought for a cause of action specified in the act, the question whether it has been brought for such a cause of action cannot be tried on affidavit, on a motion to remand the cause. *Fisk v. Union Pacific Railroad Co.*, 8 Blatchf. 243.

7. When the removal has been initiated, by the presentation of a petition by one or more of the defendants, and a compliance with the act, it is not competent for the state court to take any proceedings in the suit, other than to perfect the removal, as other defendants may appear and present their petitions. *Ib.*

8. The fact that questions may arise in the course of the litigation, besides those under the acts of Congress, and which depend upon general principles of law, cannot withdraw the cause from the jurisdiction of the federal courts. *Ib.*

9. Nor can the suit be withdrawn from such jurisdiction, by joining defendants who are not within the limitation prescribed by the statute with those who are within such limitation. *Ib.*

10. (Feb., 1880.) A suit brought by a corporation created by an act of Congress is a suit arising under the laws of the United States, and, as such, is removable into this court, under sec. 2 of the act of March 3, 1875 (18 Stat. at Large, 470). *Union Pacific Railroad Co. v. McComb*, 17 Blatchf. 510.

11. (April, 1874.) Receivers of national banking associations, as such, have not the privilege in all cases of being sued in the United States courts, and cannot remove such cases against them, from state courts to the United States courts. *Bird's Ex'r v. Cockrem*, 2 Woods. 32.

12. (June, 1879.) Under sec. 640, Revised Statutes, the right of one of the class of corporations therein mentioned, when sued in a state court, to remove the cause to the federal court, does not depend on the citizenship of the parties. *Texas v. Railroad Co.*, 3 Woods, 308.

13. Under sec. 640 of the Revised Statutes, the defendant corporation may remove a cause otherwise proper to be removed, from the state to the federal court, notwithstanding the fact that a state is plaintiff in the action. *Ib.*

14. (May, 1877.) The tenth clause of sec. 629 of the Revised Statutes of the United States, giving United States courts jurisdiction "of all suits by or against any banking association established in the district for which court is held, under any law providing for national banking associations," does not invest said courts with exclusive jurisdiction over this class of corporations. Their jurisdiction is only concurrent with that of the state courts. *Pettilon v. Noble*, 7 Biss. 449.

15. If suit is brought against such banking association in a state court, it has no right to remove the cause to the federal court. *Ib.*

16. (1875.) Under the legislation of Congress, the Union Pacific Railroad Company sued in a state court for negligence, on making application in due form, stating, *inter alia*, that it has a defense to the action arising under a law of the United States, viz. under the charter of the company, may remove the suit to the Circuit Court of the United States, and on such removal the cause may be fully tried on the merits. *Turton v. Union Pacific Railroad Co.*, 3 Dill. 366.

17. (Aug., 1873.) The fact that the corporation is one organized under a law of the United States is not, of itself, enough to give the Circuit Court jurisdiction. *Magee v. Railroad Co.*, 2 Sawyer, 447.

REVISED STATUTES.

Removal of Causes against Persons denied any Civil Right, &c.

SEC. 641. When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next Circuit Court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the state courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. It shall be the duty of the clerk of the state court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the Circuit Court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the Circuit Court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of

said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the Circuit Court as herein provided, a certificate, under the seal of the Circuit Court, stating such failure, shall be given, and upon the production thereof in said state court, the cause shall proceed therein as if no petition for a removal had been filed. [See s. 1977.]

3 March, 1863, c. 81, s. 5, v. 12, p. 756.

9 April, 1866, c. 31, s. 3, v. 14, p. 27.

11 May, 1866, c. 80, ss. 3, 5, v. 14, p. 46.

31 May, 1870, c. 114, ss. 16, 18, v. 16, p. 144.

1. (Oct., 1879.) Therefore, the denial or inability to enforce, in the judicial tribunals of a state, rights secured to a defendant by any law providing for the equal civil rights of all persons citizens of the United States, of which sec. 641 [of the Revised Statutes] speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the state, rather than a denial made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. By express requirement of the statute, the party must set forth, under oath, the facts upon which he bases his claim to have his case removed, not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. But, in the absence of constitutional or legislative impediment, he cannot swear, before his case comes to trial, that his enjoyment of his civil rights is denied to him. *Virginia v. Rives*, 10 Otto, 313.

2. The Constitution and laws of Virginia do not exclude colored citizens from service on juries. The petition for removal did not present a case under sec. 641. *Ib.*

3. (Oct., 1880.) The presumption should be indulged, in the first instance, that the state recognizes as binding on all her citizens and every department of her government an amendment to the Constitution of the United States, from the time of its adoption, and her duty to enforce it, within her limits, without reference to any inconsistent provisions in her own constitution or statutes. In this case, that presumption is strengthened and becomes conclusive, not only by the direct adjudication of the highest court of the State of Delaware, that her constitution had been modified by force of the amendments to the Constitution of the United States, but by the entire absence of any statutory

enactment, since their adoption, indicating that she does not recognize, in the fullest legal sense, their effect upon her constitution and laws. Where, therefore, a negro, indicted in one of her courts for a felony, presented a petition alleging that persons of African descent were, by reason of their race and color, excluded by those laws from service on juries, and praying that the prosecution against him be removed to the Circuit Court of the United States, — *Held*, that the prayer of the petition was properly denied. *Neal v. Delaware*, 13 Otto, 370.

4. Had the state, since the adoption of the Fourteenth Amendment, enacted any statute in conflict with its provisions, or had her judicial tribunals repudiated it as a part of the supreme law of the land; or declared that the acts passed to enforce it were inoperative and void, there would have been just ground to hold that the case was one embraced by sec. 641 of the Revised Statutes, and, therefore, removable into the Circuit Court. *Ib.*

5. (June., 1874.) The fact that, by reason of local prejudice against his race and color, a person of African descent cannot have a fair trial in the state courts is not a ground, under the Civil Rights Act, for removing a criminal prosecution against such person from the state to the federal court. *Texas v. Gaines*, 2 Woods, 342.

6. (Feb., 1878.) A petition for the removal of a cause, under sec. 641, U. S. Revised Statutes, which alleges that the law for the selection of jurors, which is constitutional and on its face fair, will be so administered as to secure a jury inimical to the petitioner, and which alleges the existence of a general prejudice against him, in the minds of the court, jurors, officers, and people, does not state facts sufficient to authorize the removal. *Ex parte Wells*, 3 Woods, 128.

7. It is only when some state law, statute, ordinance, regulation, or custom hostile to the rights of the petitioner, and their enforcement, is alleged to exist, that the petitioner can have his case removed, under that clause of said section, on which the petitioner in this case relies. *Ib.*

8. Where a petition is presented to a state court, under sec. 641, U. S. Revised Statutes, for the removal of a prosecution pending in that court, to the federal court, the state court has the right to examine its sufficiency. *Ib.*

9. But the federal court, by virtue of its superior right to try

the case, if subject to removal, is entitled to assert its jurisdiction by proper process, directed to the state court. *Ib.*

10. Where this is done by the federal court, it will be the duty of the state court, and its officers, to yield obedience to the writs issued from the federal court to effect such removal. *Ib.*

11. (1871.) The federal courts have no jurisdiction, in any form of action or proceeding, over cases of contested elections for state officers, except in the single case provided for in the twenty-third section of the Enforcement Act (16 Stat. 140), in which the sole question touching the title to the office arises out of the denial of the right to vote to citizens on account of race, color, or previous condition of servitude. *United States v. Hornibrook*, 2 Dill. 229.

12. The Circuit Courts of the United States can exercise jurisdiction in no case solely upon the ground that it falls within the constitutional grant of judicial power to the United States. There must also be an act of Congress expressly conferring the jurisdiction. *Ib.*

REVISED STATUTES.

When Petitioner is in actual custody of State Court.

SEC. 642. When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said state court, it shall be the duty of the clerk of said Circuit Court to issue a writ of *habeas corpus cum causa*, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said Circuit Court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said state court a duplicate copy of said writ.

3 March, 1863, c. 81, s. 5, v. 12, p. 756.

9 April, 1866, c. 31, s. 3, v. 14, p. 27.

11 May, 1866, c. 80, ss. 3, 5, v. 14, p. 46.

5 Feb., 1867, c. 27, v. 14, p. 385.

REVISED STATUTES.

Removal of Suits and Prosecutions against Revenue Officers and Officers acting under Registration Laws.

SEC. 643. When any civil suit or criminal prosecution is commenced in any court of a state, against any officer appointed under or acting by

authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or is commenced against any officer of the United States, or other person, on account of any act done under the provisions of Title XXVI., "THE ELECTIVE FRANCHISE," or on account of any right, title, or authority claimed by such officer or other person under any of the said provisions, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the Circuit Court next to be holden in the district where the same is pending, upon the petition of such defendant to said Circuit Court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the state where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said Circuit Court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the Circuit Court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the state court. When the suit is commenced in the state court by summons, subpoena, petition, or another process except *capias*, the clerk of the Circuit Court shall issue a writ of *certiorari* to the state court, requiring it to send to the Circuit Court the record and proceedings in the cause. When it is commenced by *capias*, or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which shall be delivered to the clerk of the state court, or left at his office, by the marshal of the district, or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the state court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the Circuit Court, and any further proceedings, trial, or judgment therein in the state court shall be void. And if the defendant in the suit or prosecution be in actual custody or

mesne process therein, it shall be the duty of the marshal, by virtue of the writ of *habeas corpus cum causa*, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the Circuit Court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the Circuit Court that no copy of the record and proceedings therein in the state court can be obtained, the Circuit Court may allow and require the plaintiff to proceed *de novo*, and to file a declaration of the cause of action, and the parties may thereupon proceed as in actions originally brought in said Circuit Court. On failure of the plaintiff so to proceed, judgment of *non prosequitur* may be rendered against him, with costs for the defendant.

2 March, 1833, c. 57, s. 3, v. 4, p. 633.

13 July, 1866, c. 184, s. 67, v. 14, p. 171.

28 Feb., 1871, c. 99, s. 16, v. 16, p. 438.

3 March, 1875, c. 130, s. 8, v. 18, p. 401.

1. (Dec., 1866.) The jurisdiction of the Circuit Court in a case between citizens of the same state, under the Internal Revenue Laws of July 1, 1862, and March 3, 1863, removed thereto from a state court under the act of March 2, 1833 (the Force Bill), and before the passage of the Internal Revenue Act of June 30, 1864, is saved by the sixty-eighth section of the Internal Revenue Act of July 13, 1866, if the justice of said Circuit Court is of opinion that the case would be removable from the state court to the Circuit Court under the sixty-seventh section of the said act of July 13, 1866. *City of Philadelphia v. The Collector*, 5 Wall. 720.

2. Where a case removed from a state court to a Circuit Court under the act of 1833, above mentioned, would be clearly removable under the provisions of the act of 1866, directing such Circuit Court to remand removed cases, unless the circuit judge should be of opinion that the same, if pending in the state court, would be removable under a provision which the last-named act made, the fact that the case was in the Circuit Court when the new act passed, and that it never was remanded, is a fact from which it may be inferred, as a conclusion of law, that it was the opinion of the circuit judge that the case was one that ought to be retained. *Id.*

3. (May, 1852.) When a cause is removed from the state court into the Circuit Court of the United States, under the provisions

of the third section of the act of March 2, 1833 (4 Stat. at Large, 633), as having been commenced against an officer of the United States, for an act done under the revenue laws of the United States, or under color thereof, the question whether the property, for the taking of which the action was brought, was seized by the defendant in the performance of his duty as an officer of the customs, under the revenue laws, is a matter of fact involved in the merits of the case, and cannot be raised or determined upon a motion to dismiss the suit. *Wood v. Matthews*, 2 Blatchf. 370.

4. The act of Congress gives the jurisdiction and right of removal "in any case" falling within the particular class of cases provided for, without any regard to the amount in controversy in the suit. Hence no question can be raised in the Circuit Court based upon the trifling value of the property for the taking of which the suit was commenced. *Ib.*

5. (Sept., 1852.) A collector who withholds from an informer the proceeds of goods condemned as forfeited for a breach of the revenue laws can, when sued for such proceeds by such informer in a state court, remove the action by *certiorari* into a Circuit Court of the United States, under sec. 3 of the act of March 2, 1833 (4 Stat. at Large, 633). *Van Zandt v. Maxwell*, 2 Blatchf. 421.

6. Whether, when such an action is improperly removed, the plaintiff can, upon a motion, have it remitted to the state court, *quære. Ib.*

7. (Jan., 1859.) Where a defendant, sued in a state court, applied to this court by petition, praying for the removal of the suit to this court, under the third section of the act of March 2, 1833 (4 Stat. at Large, 633), on the ground that the suit was for acts done by him under the revenue laws of the United States, and obtained a *certiorari* from this court to the state court, to certify the proceedings on file in that court, and the clerk of the state court returned that there were no proceedings on file in his office in the suit, and the defendant's attorney then entered a rule in this court for the plaintiff to declare in twenty days, and notice of the rule was served on the plaintiff's attorneys, who admitted service of it, but failed to declare, and a judgment as in case of nonsuit was then entered against the plaintiff, — *Held*, that such judgment was regular. *Abranches v. Schell*, 4 Blatchf. 256.

8. The admission by the plaintiff's attorney of service of the rule to declare waived any informality attending the removal of the cause to this court. *Ib.*

9. All that the statute requires is that it shall appear from the petition that the defendant was sued on account of acts done by him under the revenue laws of the United States. It does not require a statement of the cause of action or the kind of process. *Ib.*

10. The writs of *certiorari* and *habeas corpus* provided for by the statute are neither of them required for the removal of the cause to this court. *Ib.*

11. (March, 1859.) The post-office laws of the United States are "revenue laws," within the meaning of sec. 3 of the act of Congress of March 2, 1833 (4 Stat. at Large, 633), providing for the removal into a Circuit Court of the United States from a state court of a suit brought against a person for an act done under the revenue laws of the United States, or under color thereof. *Warner v. Fowler*, 4 Blatchf. 311.

12. An action brought in a state court against a postmaster for an alleged wrongful refusal to deliver a letter to the plaintiff is removable into the Circuit Court of the United States, under that act. *Ib.*

13. (Dec., 1862.) A suit against an assistant treasurer of the United States, in a state court, to recover the value of certain bonds issued by the United States, which, when they came into his hands from the plaintiff, he, under instructions from the Treasury Department of the United States, retained, on the ground that they were unlawfully put into circulation, as against the party to whom they were issued, is not a suit which can be removed into this court under the third section of the act of March 2, 1833 (4 Stat. at Large, 633), which provides for the removal into this court of a "suit commenced in a court of any state, against any officer of the United States or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer, or other person, under any such law of the United States. *Vietor v. Cisco*, 5 Blatchf. 128.

14. (July, 1866.) Where the proceedings taken by a defendant, in a suit brought in a state court, to remove the suit into

this court, under the provisions of the third section of the act of March 2, 1833 (4 Stat. at Large, 633), are in conformity with the act, the removal is imperative; and the question whether the defendant had in fact a right to remove the suit cannot be raised by a motion to this court, before the trial, to remand the suit to the state court. *Dennistoun v. Draper*, 5 Blatchf. 336.

15. Any question as to the jurisdiction of this court in the premises, based on the point of an alleged absence of right in the defendant to remove the suit, can be raised at the trial. *Ib.*

16. (Oct., 1870.) Where an action against a collector of internal revenue, to recover back a license fee paid to him under protest, was commenced in a state court before July, 1866, and was removed to this court by virtue of the fiftieth section of the act of June 30, 1864 (13 Stat. at Large, 241), and the action was one which, if commenced in a state court after the passage of the act of July 13, 1866 (14 Stat. at Large, 98), would have been removable to this court under the sixty-seventh section (p. 171) of that act, — *Held*, that, notwithstanding the repeal of the fiftieth section of the act of 1864 by the sixty-eighth section of the act of 1866, this court continued to have, by virtue of the proviso to such sixty-eighth section, jurisdiction of the action. *Salt Company v. Wilkinson*, 8 Blatchf. 30.

17. (May, 1877.) Suits against revenue officers of the United States, on account of acts done under color of their offices, may be removed from state courts into the courts of the United States. *Venable v. Richards*, 1 Hughes, 326.

18. Sec. 10 of the act of Congress approved March 3, 1875, ch. 137, which repeals all acts in conflict with its provisions, does not repeal sec. 643 of the Revised Statutes of the United States, providing for the removal of suits from the state to the national courts in certain cases. *Ib.*

19. (April, 1871.) An action on the case, begun in a state court, to recover damages for alleged slanderous words spoken by a United States collector of customs while in the discharge of his official duty, and explanatory of it, can be properly removed to the United States Circuit Court, under the provisions of the "Force Act," approved March 2, 1833. *Buttner v. Miller*, 1 Woods, 620.

20. (Sept., 1876.) Under sec. 643 of the Revised Statutes, providing for the removal of criminal cases from a state to a

federal court, the prosecution is not commenced until the finding of an indictment. *State of Georgia v. O'Grady*, 3 Woods, 496.

21. Upon the trial of a case removed under sec. 643 of the Revised Statutes, the right of the parties to challenge jurors is regulated by the law of the United States. *Ib.*

22. Upon the trial of an indictment for murder, removed to the federal court under sec. 643 of the Revised Statutes of the United States, the accused is called to answer to the offense as defined by the laws of the state. *Ib.*

23. (Sept., 1877.) Sec. 643, Revised Statutes, so far as it provides for the removal to the United States Circuit Court of prosecutions against federal revenue officers in the state courts, is a constitutional enactment. *Findley v. Satterfield*, 3 Woods, 504.

24. The provisions of said section apply to every case of a federal revenue officer indicted in a state court for an act done under color of the United States revenue laws, but charged to be in violation of the criminal law of the state, and are not restricted to cases where an attempt is made by a state legislature to nullify a law of the United States. *Ib.*

25. (April, 1868.) The provisions of the act of March 2, 1833 (4 Stat. 632), relating to the removal of causes from state to federal courts, are still in force, except as to cases arising under the internal revenue system. *Peyton v. Bliss*, Woolw. 170.

26. The act imposing direct taxes upon the states (12 Stat. 294) is not within this exception. *Ib.*

27. That act is a revenue law, and therefore cases arising under it are subject to removal under the act of 1833. *Ib.*

28. *The Insurance Co. v. Ritchie* (5 Wall. 541) and *The City of Philadelphia v. The Collector* (id. 720) commented on and distinguished. *Ib.*

29. (1875.) An action by the collector of internal revenue against the deputy collector, on his official bond, may be removed from the state court into the federal court, under the act of March 3, 1875. *Orner v. Saunders*, 3 Dill. 284.

REVISED STATUTES.

Removal of Suits by Aliens in a Particular Case.

SEC. 644. Whenever a personal action has been or shall be brought in any state court, by an alien against a citizen of a state, who is, or at

the time the alleged action accrued was, a civil officer of the United States, being a non-resident of that state wherein jurisdiction is obtained by the state court, by personal service of process, such action may be removed into the Circuit Court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a state court, by the provisions of the preceding section.

30 March, 1872, c. 72, v. 17, p. 44.

3 March, 1875, c. 137, s. 2, v. 18, p. 471.

Removal. Record.

REVISED STATUTES.

When Copies of Records are refused by Clerk of State Court.

SEC. 645. In any case where a party is entitled to copies of the record and proceedings in any suit or prosecution in a state court, to be used in any court of the United States, if the clerk of said state court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such record and proceedings are needed may, on proof by affidavit that the clerk of said state court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit, or otherwise, as the circumstances of the case may require and allow; and, thereupon, such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

2 March, 1833, c. 57, s. 4, v. 4, p. 634.

28 Feb., 1871, c. 99, s. 17, v. 16, p. 439.

ACT OF MARCH 3, 1875.

SEC. 7. That in all causes removable under this act, if the term of the Circuit Court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the state court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said Circuit Court and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf;

That if the clerk of the state court in which any such cause shall be pending shall refuse to any one or more of the parties or persons

applying to remove the same a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the Circuit Court of the United States to which said action or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both, in the discretion of the court.

And the Circuit Court to which any cause shall be removable under this act shall have power to issue a writ of *certiorari* to said state court commanding said state court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law ;

And if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said state court refuses to furnish a copy, on payment of legal fees, or for any other reason, the Circuit Court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced within such time as the court may determine ; and in default thereof the court shall dismiss the said action or proceeding ;

But if said order shall be complied with, then said Circuit Court shall require the other party to plead, and said action or proceeding shall proceed to final judgment ; and the said Circuit Court may make an order requiring the parties thereto to plead *de novo* ; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid. [*Supplement to Rev. Stat.*, page 175.]

1. (April, 1846.) Where an action is removed from a state court to this court, under the twelfth section of the Judiciary Act of 1789 (1 Stat. at Large, 79), certified copies of the process or papers by which the suit was commenced in the state court, and of an order of that court for their transmission, should be sent and entered in this court. *Martin v. Kanouse*, 1 Blatchf. 149.

2. Where a defendant, instead of adopting that course, entered here what purported to be a copy of a declaration in the action in the state court, but the copy was not certified from the state court, or accompanied by a certified copy of any order of the

state court for its transmission, and then entered here a rule to declare, — *Held*, that the rule to declare must be vacated, and the copy declaration be taken from the files. *Ib*.

3. (Dec., 1873.) The terms of this court appointed to be held by sec. 1 of the act of Feb. 7, 1873 (17 Stat. 422), being terms exclusively for the trial and disposal of criminal cases and matters, are not sessions of this court, within the meaning of the act requiring copies of proceedings in a suit to be entered in this court on the first day of its session, in order to perfect the removal of such suit into this court. *Jones v. Oceanic Steam Navigation Co.*, 11 Blatchf. 406.

4. (June, 1876.) The plaintiff took proceedings in December, 1875, under the act of March 3, 1875 (18 Stat. at Large, 470), to remove into this court a suit brought by him in a state court. The state court made an order that the cause be removed, but eighteen days afterwards vacated such order. A term of this court began on the first Monday of April, 1876. The plaintiff, although he had in January, 1876, obtained from the clerk of the state court a certified copy of the record, did not file it in this court, or enter his appearance there, but, in May, 1876, applied to this court to issue a *certiorari* to the state court, commanding it to remove the suit to this court, and to certify the record therein according to law. *Held*, that the plaintiff had been guilty of laches, and could not be allowed now to perfect the removal of the cause; that he already had all which the *certiorari* could give to him, and that the application must be refused. *Broadnax v. Eisner*, 13 Blatchf. 366.

5. (May, 1877.) The plaintiff in a suit in equity in a state court presented to that court, on the 4th of February, 1876, a petition for its removal to this court, under the act of March 3, 1875 (18 Stat. at Large, 470), with the proper bond. The session of this court next after the 4th of February began, by law, on the last Monday of February. The plaintiff did not file in this court a copy of the record until the first day of the ensuing April term of this court. *Held*, that the suit must be remanded to the state court, with costs, as not removed to this court according to law. *Bright v. Milwaukee & St. Paul Railroad Co.*, 14 Blatchf. 214.

6. (April, 1878.) Under sec. 3 of the act of March 3, 1875, for the removal of causes (18 Stat. 470), the failure of the party

seeking the removal, to file in the Circuit Court, on or before the first day of its session next after the filing of the petition for removal, a copy of the record from the state court, does not deprive the Circuit Court of jurisdiction of the case. *Jackson v. Insurance Co.*, 3 Woods, 413.

7. In such a case, the Circuit Court has discretion to remand the cause or not, as to it shall seem most conducive to the ends of justice. *Ib.*

8. (Dec., 1877.) A defect or omission in the transcript of the record of the state court [on removal] can be cured by *certiorari*. It is not a ground for remanding the cause. *Dennis v. County of Alachua*, 3 Woods, 684.

9. (Jan., 1876.) The proper time for entering in the Circuit Court "copies of the proper papers," &c., is on the first day of the next session after the filing of the petition for removal, affidavits, &c. But if the term of the Circuit Court to which the same is removable should commence within twenty days after the filing of the petition and bond in the Circuit Court, still the removing party is to have twenty days to file copy of record. *Clippinger v. Life Insurance Co.*, 1 Flipp. 456.

10. (Feb., 1869.) Where the clerk of the state court had, on proper application, refused to furnish a certified copy of the record and proceedings [on removal of the cause], this court will allow the parties to supply them. *Akerly v. Vilas*, 2 Biss. 110.

11. (April, 1875.) It is not essential that the record be certified by the judge of the state court. The attestation of the clerk under the seal of the court is sufficient. *Osgood v. Railroad Co.*, 6 Biss. 331.

12. (March, 1876.) A *certiorari* is not necessary [under the act of March 3, 1875], where the record of the state court is already before the federal court. *Scott v. Railroad Co.*, 6 Biss. 529.

13. (1870.) In a case removed from a state court to the United States court, under sec. 12 of the Judiciary Act, it is incumbent on the party who applies for the removal to file in the latter court, not only a copy of the summons or other process, but also of the declaration, petition, or bill, the petition for the removal, and the order, if any was made, of the state court thereon. *McBratney v. Usher*, 1 Dill. 367.

14. The word "process," used in this section, is equivalent in meaning to the word "proceedings." *Ib.*

15. (May, 1878.) Where the clerk of the state court made up the record in detached papers, certifying to each one, and also that the papers constituted the whole record, — *Held*, a sufficient “copy of the record.” *Commercial & Savings Bank v. Corbett*, 5 Sawyer, 172.

REVISED STATUTES.

Attachments, Injunctions, and Indemnity Bonds to remain in Force after Removal.

SEC. 646. When a suit is removed for trial, from a state court to a Circuit Court, as provided in the foregoing sections, any attachment of the goods or estate of the defendant, by the original process, shall hold the same to answer the final judgment, in the same manner as, by the laws of such state, they would have been held to answer final judgment, had it been rendered by the court in which the suit was commenced; and any injunction granted before the removal of the cause, against the defendant applying for its removal, shall continue in force until modified or dissolved by the United States court into which the cause is removed; and any bond of indemnity or other obligation, given by the plaintiff upon the issuing or granting of any attachment, writ of injunction, or other restraining process, against the defendant petitioning for the removal of the cause, shall also continue in full force, and may be prosecuted by the defendant and made available for his indemnity in case the attachment, injunction, or other restraining process be set aside or dissolved, or judgment be rendered in his favor, in the same manner and with the same effect as if such attachment, injunction, or other restraining process had been granted, and such bond had been originally filed or given in such state court.

24 Sept., 1789, c. 20, s. 12, v. 1, p. 79.

2 March, 1833, c. 57, s. 3, v. 4, p. 633.

3 March, 1863, c. 81, s. 5, v. 12, p. 756.

9 April, 1866, c. 31, s. 3, v. 14, p. 27.

11 May, 1866, c. 80, ss. 3, 5, v. 14, p. 46.

13 July, 1866, c. 184, s. 67, v. 14, p. 171.

27 July, 1866, c. 288, v. 14, p. 306.

5 Feb., 1867, c. 27, v. 14, p. 385.

2 March, 1867, c. 196, v. 14, p. 558.

27 July, 1868, c. 255, s. 2, v. 15, p. 227.

28 Feb., 1871, c. 99, s. 16, v. 16, pp. 438, 439.

ACT OF MARCH 3, 1875.

SEC. 4. That when any suit shall be removed from a state court to a Circuit Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced ;

And all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal ;

And all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed. [*Supplement to Rev. Stat.*, page 175.]

1. (Nov., 1854.) Where a suit in a state court is removed by a defendant into this court, under the twelfth section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 79), no attachment of the property of the defendant by the state court, can hold the property, after the removal of the suit into this court, unless such attachment was the original process in the suit in the state court. *New England Screw Co. v. Bliven*, 3 Blatchf. 240.

2. (Nov., 1862.) After the removal of a suit into this court from a state court, under the twelfth section of the Judiciary Act of Sept. 24, 1789, an attachment of property of the defendant, made before the removal of the suit into this court, under a warrant of attachment issued by the state court after the commencement of the suit, will continue to hold the property to answer the final judgment of this court in the suit, as being, within the meaning of said twelfth section, an attachment of property by "the original process." *Barney v. Globe Bank*, 5 Blatchf. 107.

3. (April, 1868.) When a case is removed, under the said act of 1789, any injunction issued before its removal, *ipso facto* falls. *Hatch v. Chicago, Rock Island, & Pacific Railroad Co.*, 6 Blatchf. 105.

4. (June, 1852.) Where a case has been certified from a state court to the Circuit Court, under the twelfth section of the

Judiciary Act of 1789, the case stands as though the suit had been originally commenced in the Circuit Court. *McLeod v. Duncan*, 5 McLean, 342.

5. An injunction allowed before the filing of the bill, in the state court, necessarily falls, as the Circuit Court cannot punish for a contempt of that court. *Ib.*

6. A motion for an attachment, for a violation of the injunction in the state court, cannot be allowed; nor a motion to dissolve the injunction, as it necessarily falls by the removal of the case. *Ib.*

7. A motion for an injunction may be heard on the face of the bill, in this court, the same as if it had been originally filed here. *Ib.*

8. (April, 1869.) An injunction issued by a state court is dissolved by the removal of the cause into the federal court. *Northwestern Distilling Co. v. Corse*, 4 Biss. 514.

REVISED STATUTES.

Removal of Suits where Parties claim Land under Titles from Different States.

SEC. 647. If, in any action commenced in a state court, where the title of land is concerned, and the parties are citizens of the same state, and the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, the sum or value being made to appear to the satisfaction of the court, either party, before the trial, states to the court, and makes affidavit, if they require it, that he claims and shall rely upon a right or title to the land under a grant from a state other than that in which the suit is pending, and produces the original grant, or an exemplification of it, except where the loss of public records shall put it out of his power, and moves that the adverse party inform the court whether he claims a right or title to the land under a grant from the state in which the suit is pending, the said adverse party shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he gives information that he does claim under such grant, the party claiming under the grant first mentioned may, on motion, remove the cause for trial into the next Circuit Court to be holden in the district where such suit is pending. If the party so removing the cause is defendant, the removal shall be made under the regulations governing removals of a cause into such court by an alien; and neither party removing the cause shall be

allowed to plead or give evidence of any other title than that stated by him as aforesaid as the ground of his claim.

24 Sept., 1789, c. 20, s. 12, v. 1, p. 79.

3 March, 1875, c. 137, ss. 2, 3, v. 18, p. 471.

ACT OF MARCH 3, 1875. (*Second and third paragraphs.*)

SEC. 3. And if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond as hereinbefore mentioned in this act, remove the cause for trial to the Circuit Court of the United States next to be holden in such district;

And any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim. [*Supplement to Rev. Stat., page 174.*]

1. (Feb., 1815.) This court has jurisdiction, where one party claims land under a grant from the State of New Hampshire, and the other under a grant from the State of Vermont, although at the time of the first grant Vermont was part of New Hampshire. *Town of Pawlet v. Clark*, 9 Cranch, 292.

Removal. Remanding.

ACT OF MARCH 3, 1875.

SEC. 5. That if, in any suit commenced in a Circuit Court, or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after

such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just. [*Supplement to Rev. Stat.*, page 175.]

1. (Dec., 1867.) Where a party removes, under a statute of the United States, from a state court to the Circuit Court of the United States, a case depending in point of merits on the right construction of such statute, the Circuit Court cannot dismiss and remand the case, upon motion, on the ground that it has no jurisdiction, because the statute is unconstitutional and void. *The Mayor v. Cooper*, 6 Wall. 247.

2. The validity of the defense which such statute may authorize to be made is a distinct subject, and to be passed on by the court, when in due form before it. *Ib.*

3. (June, 1872.) A suit brought in a state court having been removed into this court, under sec. 5 of the act of March 3, 1863 (12 Stat. at Large, 756), as having been brought for an arrest of the plaintiff, made by the defendant, during the late rebellion, by authority of the President, the plaintiff moved to remand the cause to the state court, on the ground that the jurisdiction of this court over it had been taken away by the act of March 2, 1867 (14 id. 432). *Held*, that the motion must be denied. *Lamar v. Dana*, 10 Blatchf. 34.

4. Notwithstanding the latter act, the parties respectively can raise any questions in this court, after removal here, which they could raise if the cause had been here commenced, or which they could raise in the state court, if the cause were remanded. *Ib.*

5. If it be insisted that the said act of March 2, 1867, legalizing acts done by authority of the President, and forbidding all courts, state or federal, to take jurisdiction thereof, be invalid, as unconstitutional, such invalidity can be urged in the federal court, with the same effect as in the state courts, and on like grounds. *Ib.*

6. An act of Congress, relied upon as a defense, ought not to be declared as unconstitutional, on such a motion, but such de-

fense should be met in the ordinary mode, on trial, demurrer, or otherwise, in which a ruling upon the question may appear on the record, and, if need be, may be reviewed in the court of last resort. *Ib.*

7. (Sept., 1874.) A defendant in a suit brought in a state court of New York, removed the suit into this court, on the ground that, being a citizen of Connecticut, he had been sued by a citizen of New York. The plaintiff moved to remand the cause to the state court, on the ground that the defendant was not, in fact, a citizen of Connecticut. *Held*, that, on the question of such citizenship of the defendant, the affirmative was with the defendant; that, where he was a permanent resident and citizen of Connecticut down to a period shortly prior to the commencement of the suit, the presumption was, that such permanent residence and citizenship continued, until it was shown to be changed; that, where the cause was removed on the defendant's oath as to the jurisdictional fact of such residence and citizenship, it was not enough for the plaintiff to raise a doubt on the question; and that the proceedings for removal being regular, and the question raised by the plaintiff being fairly disputed, it was not a proper practice to remand the cause on motion. *Heath v. Austin*, 12 Blatchf. 320.

8. (Jan., 1876.) A suit in a state court, which falls within the description of suits removable into this court, may be removed, although it could not originally have been brought in this court. *Warner v. Pennsylvania Railroad Co.*, 13 Blatchf. 231.

9. That principle is not changed by the provision of sec. 5 of the act of March 3, 1875 (18 Stat. at Large, 472), which provides for the dismissal or remanding by this court of suits not really and substantially involving a dispute or controversy within the jurisdiction of this court. *Ib.*

10. (May, 1879.) The defendant in a suit, after taking steps to remove it into this court, did not file in this court a copy of the record of the suit until three days after the day named in the removal bond as the day on which the copy of the record was to be filed. The case was not within the exceptions provided for in sec. 7 of the said act. The plaintiff had not waived the delay, and the defendant offered no excuse except an allegation that the non-filing on the proper day was an inadvertence. The plaintiff moved to remand the cause. *Held*, that the motion

must be granted. *McLean v. St. Paul & Chicago Railway Co.*, 16 Blatchf. 309.

11. (Dec., 1879.) W., a citizen of New York, brought a suit in a state court of New York against S., a citizen of New York, to recover money alleged to have been due by S. to N., a voluntary assignor to W. By an order of the state court, G., a citizen of Ohio, who claimed the money as assignee in bankruptcy of N., was made defendant in the suit in place of S., S. having paid the money into court. W. then filed an amended complaint in the suit, in the state court, treating G. as the sole defendant, and asking judgment against him. G. answered the amended complaint. G. then removed the case into this court, without giving notice to the plaintiff of the application for the removal. The petition for removal set forth that "the controversy is between W., as assignee of the estate of N., who was at the commencement of this action, and now is, a citizen of the State of New York, and G., as assignee in bankruptcy of N., who is, and was at the commencement of this action, a citizen of the State of Ohio." On a motion by the plaintiff to remand the cause, *held*,—

(1.) That the petition alleged the personal citizenship of the parties, and was not defective.

(2.) That no notice of the application for the removal was necessary, and the state court could, in practice, require it or dispense with it.

(3.) That it is not necessary, under secs. 2 and 3 of the act of March 3, 1875 (18 Stat. at Large, 470), in order to the removal of a suit, that it should appear that the parties were citizens of different states when the suit was commenced.

(4.) That the suit, as between W. and G., must be regarded as having been commenced when G. was substituted for S. as a defendant. *Wehl v. Wald*, 17 Blatchf. 342.

12. (Dec., 1879.) On March 17, the state court in which the suit was pending made an order, on the petition of the defendant, that it be removed into this court. The defendant ought to have filed the record in this court by April 7. It was not filed till April 10. This court, on May 24, made an order remanding the cause. June 2, on a new petition filed that day by the defendant, which set forth that the suit was then pending in the state court, that court made an order that the suit be removed into this court. *Held*,—

(1.) That, as the removal was provided for by secs. 2 and 3 of the act of March 3, 1875 (18 Stat. at Large, 470, 471), the petition was in time if filed before or at the term at which the cause "could be first tried, and before the trial thereof."

(2.) That the publication of the second edition of the Revised Statutes, under the act of March 2, 1877 (19 Stat. at Large, 268), did not reinstate subdivision 1 of section 639 of the Revised Statutes, as applicable to this suit.

(3.) That the proper condition of the bond on removal was that prescribed by sec. 3 of the act of 1875.

(4.) That the petition of June 2 was filed before or at the term at which the cause could be first tried.

(5.) That, as the defendant had once removed the cause to this court, and had failed, by neglect, to perfect the removal, and the cause had been remanded for that reason, the right to remove it had been waived and lost.

(6.) That the defendant could not now be allowed to furnish an excuse for not having in time filed the record on the first removal, and that it had acquiesced in the first remand by averring, in the second petition, that the cause was then pending in the state court. *McLean v. St. Paul & Chicago Railway Co.*, 17 Blatchf. 363.

13. (Dec., 1879.) Nothing had transpired, in pleading or evidence, since the case came into this court, to show that said formal defendant ought now to be held to be an actual, real, and necessary defendant; and a motion to remand the cause was denied. *Chicago, St. Louis, & New Orleans Railroad Co. v. McComb*, 17 Blatchf. 371.

14. (Oct., 1822.) In an ejectment instituted in a state court of Pennsylvania by A., a citizen of Pennsylvania, against B., also a citizen of that state, tenant in possession, C., a citizen of Maryland, after a judgment by default against B., was, upon his petition, admitted as defendant in the suit, the petition stating that B. was his tenant. The petition of the plaintiff [defendant] further stated that the land in dispute was worth more than \$500; and it prayed that the cause might be removed into the Circuit Court, which was granted. This court remanded the cause to the state court, on the ground of want of jurisdiction; C. being only a co-defendant with B., who, as well as the plain-

tiff, is a citizen of Pennsylvania. *Beardsley v. Torrey*, 4 Wash. 286.

15. In Pennsylvania the landlord cannot be permitted to defend alone in ejectment, in the room of the tenant, without the consent of the plaintiff. *Ib.*

16. (May, 1878.) Where a cause had been removed from a state court to a federal court, and had been pending and proceeding there, the removal acquiesced in for a number of years, and all objection to the jurisdiction of the federal court had been obviated by amendment, — *Held*, that the cause would not be remanded to the state court, on account of any irregularities in its removal. *Edgerton & Doane v. Gilpin*, 3 Woods, 278.

17. (Oct., 1878.) A suit against a corporation was removed from the state to the federal court, on the ground that there was in it a controversy between citizens of different states, the plaintiff being a citizen of the state where the suit was brought. On motion made by the plaintiff to remand the suit, because both parties were citizens of the same state, — *Held*, that the burden of proof was on the corporation to show that it was not a citizen of the same state with the plaintiff. *Copeland v. Railroad Co.*, 3 Woods, 651.

18. (Dec., 1877.) The act of March 2, 1867 (14 Stat. 558), for the removal of causes from the state to the federal courts, is not repealed by the act of March 3, 1875 (18 Stat. 470), on the same subject. *Dennis v. County of Alachua*, 3 Woods, 683.

19. It is not necessary that the petition for removal should be signed, or the affidavit required by the act of 1867 made, by the petitioner in person. Both may be done by his attorney in fact. *Ib.*

20. The fact that the bond for removal was signed by the petitioner by attorney, or that the sureties on the same are insufficient, are not good grounds for remanding the cause to the state court. *Ib.*

21. When a cause is once removed from a state to a federal court, and there are no jurisdictional objections to its remaining there, it will not be remanded or dismissed for defects in the bond for removal, insufficiency of sureties thereon, or other irregularities which can be remedied or have not worked any prejudice to the opposite party. *Ib.*

22. (Nov., 1877.) Under the act of March 2, 1867, for the

removal of causes, the filing in the federal court of an imperfect transcript of the record in the state court is no ground for remanding the cause. *Cook v. Whitney*, 3 Woods, 715.

23. (Oct., 1876.) Although no motion be made to remand the cause to the state court until a full term had passed by since the filing of such motion and the transcript of the proceedings, there is no waiver of the right so to do, nor will such conduct be deemed a submission to the jurisdiction of the United States court; no other proceedings being had therein than the filing of such transcript and motion. *Young v. Insurance Co.*, 1 Flipp. 599.

24. (1871.) Where the plaintiff, being a citizen of the state, brought ejectment in the usual form, in the state court, against the defendant, also a citizen of the state, who pleaded to the merits, and a third person, a citizen of another state, was, on his own application, made a co-defendant, but filed no plea, and both joined in a petition for the removal of the cause to the federal court, stating no facts in relation to the ownership of the land, or other relation to each other, and the court ordered the removal, — *Held*, that the cause was improperly transferred, and the same was remanded. *Allin v. Robinson*, 1 Dill. 119.

25. Whether the non-resident landlord may, in such case, where the title is in dispute, and the resident defendant is a mere tenant, have the cause removed on proper petition, under the act of July 27, 1866, *quære*. *Ib*.

26. (May, 1880.) The only necessary consequence of failure to file the record of a case removed from a state court, under the act of March 3, 1875, by the first day of the next term after the application for removal, or within twenty days after such application, is to create a liability on the bond. Unnecessary delay, amounting to laches, in filing such record, prejudicing the other party, may be ground for remanding the case; but the party is not entitled for such cause, as matter of right, to have it remanded. Delay in filing record in this cause, — *Held*, not sufficient ground for remanding the cause to the state court. *Kidder v. Featleau*, 1 McCrary, 323.

27. (Aug., 1880.) A federal court will not, upon motion to remand, enter upon inquiry as to the sufficiency of the sureties on a bond, conditioned as required by the removal act, and approved by the state court. *Van Allen v. Railroad Co.*, 1 McCrary, 598.

28. (Oct., 1880.) Causes removed from the state court may be remanded on motion, when the record shows a want of jurisdiction in the federal court. If, upon the face of the record, the federal court has jurisdiction, objection to trial here can be raised only by formal plea to the jurisdiction. That a plaintiff conveyed his interest in the property in controversy to one of his associate plaintiffs, "for the purpose of conferring jurisdiction on" the federal court, is no ground for remanding the case, provided the sale was in fact made. Otherwise, if the transfer be without consideration, and the party pretending to convey still is the owner of the property. That would be a collusive proceeding, and ground for remanding the cause to the state court. But this is a question of fact which must be raised by plea. *Hoyt v. Wright*, 1 McCrary, 130.

29. (Sept., 1867.) Notwithstanding the order of a state court allowing a petition for removal of a cause to a United States Circuit Court, the national court must determine for itself the question of its jurisdiction; and if it appears that any of the defendants are not entitled to such removal, the cause, as to them, must be remanded. *Field v. Lownsdale*, Deady, 288.

30. (Aug., 1873.) Motion to remand the cause to the state court may be made before trial, whenever there are no disputed facts, and it clearly appears from the record, as well as the admissions of counsel, that the corporation has no defense arising under a law of the United States. *Magee v. Railroad Co.*, 2 Sawyer, 447.

31. A suit removed from a state court, into the Circuit Court, upon a petition stating that the defendant has a defense arising under a law of the United States, will be remanded, when it appears by the defendant's answer that no such defense is claimed or made. *Id.*

Removal. Pleadings.

ACT OF MARCH 3, 1875.

SEC. 6. That the Circuit Court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said Circuit Court, and the same proceedings had been taken in such suit in said Circuit Court as shall

have been had therein in said state court prior to its removal. [*Supplement to Rev. Stat.*, page 175.]

1. (Dec., 1859.) Where the Circuit Court of the United States has jurisdiction over the parties and cause of action, by virtue of the twelfth section of the Judiciary Act, it cannot be affected by any amendment of the pleadings changing the cause of action, or by the proviso to the eleventh section. *Green v. Custard*, 23 How. 484.

2. (Dec., 1869.) Whether or not, on the transfer of a case from a state court to a federal court, under the twelfth section of the Judiciary Act, a new declaration should be filed, is a question of practice and not a subject for error. *Insurance Co. v. Weide*, 9 Wall. 677.

3. (Dec., 1872.) Where, in proceedings in state courts, the laws of a state allow a set-off pleaded to be interposed and tried in the same suit with the claim against which it is pleaded, the same thing may be done when the suit is brought or transferred into the federal courts from them. *Partridge v. Insurance Co.*, 15 Wall. 573.

4. (Oct., 1877.) Where the record shows that a suit brought in a state court was, on the petition of the defendant, and by reason of the character of the parties, duly removed to the proper Circuit Court of the United States, the jurisdiction of the latter court is not lost for want of an averment of citizenship in the bill of complaint originally filed, or in the amendments thereto, which were made in the Circuit Court. *Briges v. Sperry*, 5 Otto, 401.

5. (April, 1846.) On the transmission of the process or declaration by which the suit was commenced in the State court, and the entry of the same in this court, the plaintiff must file a new declaration, according to the practice of this court [New York], as if the suit were an original one here. *Martin v. Kanouse*, 1 Blatchf. 149.

6. Until the filing of such declaration, the plaintiff cannot enter a rule to plead, or a default for not pleading. *Ib.*

7. (March, 1871.) A suit was commenced in a state court, and removed into this court under the provisions of the act of July 27, 1868 (15 Stat. at Large, 226). The plaintiff then filed a bill in this court in the suit, naming as a party defendant a

person who was not a party to the suit as brought in the state court. The defendants moved, for that reason, to take the bill from the files. *Held*, that the motion must be granted. *Fisk v. Union Pacific Railroad Co.*, 8 Blatchf. 299.

8. The plaintiff also filed a declaration against some, but not all, of the persons named as defendants in the suit as brought in the state court, containing allegations found in the complaint in the suit as so brought, and asking relief thereon which it would have been proper for the state court to grant in the suit thereon, against the defendants liable thereon, such relief being relief properly grantable in this court only in a suit at law. The defendants moved to take the declaration from the files. *Held*, that the motion must be denied. *Ib.*

9. *Held*, also, that the plaintiff could not be compelled to elect whether to proceed at law or in equity in this court, but that, in addition to proceeding with his suit at law by such declaration, he could at the same time proceed by bill in equity for equitable relief, founded on allegations in substance the same as allegations contained in the original complaint in the state court. *Ib.*

10. (Jan., 1872.) In the case of a removal, by one of two defendants, under the act of July 27, 1866 (14 Stat. at Large, 306), after the cause is at issue, in the state court, on pleadings, there is no need of any new pleadings in this court, provided they are in a proper shape for a trial, as between the plaintiff and such defendant. *Dart v. McKinney*, 9 Blatchf. 359.

11. (Dec., 1875.) When an action at law, removed under the act of March 3, 1875 (18 Stat. 471), is at issue when removed, no other or different pleadings are necessary than those in the state court. *National Bank v. Wheeler*, 13 Blatchf. 218.

12. (Jan., 1879.) Where a complaint put in, in the state court, before the removal of a cause, prays for relief purely equitable, and also for relief purely legal, the plaintiff must replead in the federal court. *La Mothe Mfg. Co. v. National Tube Works Co.*, 15 Blatchf. 432.

13. (Nov., 1878.) A plea to the jurisdiction and demurrer thereto having been filed in the state court, and the cause thereupon removed, under the act of 1875, before the state court had passed upon the plea, — *Held*, that though the plea was sufficient to have defeated the action in the state court, yet, inasmuch as it set forth the facts requisite to give jurisdiction to the federal

court, the latter acquired jurisdiction by removal, and was bound to treat the plea as if the suit had been originally commenced in the federal court. *Kelly v. Virginia Protection Ins. Co.*, 3 Hughes, 449.

14. (June, 1847.) A case removed from a state court, to the Circuit Court of the United States, stands in the latter as it did at the time of the removal in the former. *Gier v. Gregg & Wald*, 4 McLean, 202.

15. (Sept., 1872.) An action removed after issue joined, from the state to the federal courts, under the act of July 27, 1866, as amended by the act of March 2, 1867, must be tried in the federal courts upon the pleadings certified from the state courts, and the same force and effect must be given to them by the federal courts as in the state courts, if the case had remained there. *Akerly v. Vilas*, 3 Biss. 332.

16. In such a case the cause stands in the federal courts as it stood in the courts of the state, the former clothed with the powers of the state courts, and all rights acquired by, and all defenses allowed under, the state laws are to be recognized in this court. *Ib.*

17. Congress did not intend by these statutes to allow either party to obtain a practice or ruling more favorable to them, or, when dissatisfied in the state court, to obtain a trial *de novo*. *Ib.*

18. (1870.) In cases properly removed here under sec. 12 of the Judiciary Act, the defendant is not in default for not having answered or pleaded in the state court, before or at the time of filing his petition for the removal. *Webster v. Crothers*, 1 Dill. 301.

Removal. Practice.

1. (Oct., 1877.) As important questions of practice are likely to arise under that act [of March 3, 1875 (18 Stat. 475)], this decision [concerning the removal of causes] is to be considered as conclusive only upon the question directly involved and decided. *Gold-Washing and Water Co. v. Keyes*, 6 Otto, 199.

2. (Oct., 1879.) The proceedings had in a cause are not vacated by its removal from a state court to the Circuit Court. *Duncan v. Gegan*, 11 Otto, 810.

3. Where the relative priority of certain mortgages had been determined on appeal, by the Supreme Court of the state, and

on the return of the mandate to the court of original jurisdiction the fund derived from the judicial sale of the property covered by them was distributed pursuant to the judgment, — *Held*, that the Circuit Court, the cause having been thereto removed, properly ruled that the parties, as to the rights litigated and disposed of, were concluded by the judgment. *Ib.*

4. (Jan., 1852.) In a common-law action, in the Circuit Court for the Southern District of New York, the assignee of a non-negotiable contract has no capacity to sue upon it, in his own name; the provision of the state Code of Procedure, requiring every suit to be brought in the name of the real party in interest, not having been adopted by that court. *Suydam v. Ewing*, 2 Blatchf. 359.

5. And this practice applies not only to an action originally commenced in that court, but to one removed into that court from a court of the state, and to all the proceedings in such action after its removal. *Ib.*

6. Accordingly, where a debt was contracted with a copartnership, and afterwards the interests of some of the members of the copartnership in the debt were assigned, and then a suit at law was brought thereon, in a court of the state, in the names of the real parties in interest, and was removed into the Circuit Court for the Southern District of New York, and afterwards one of the partners died, — *Held*, that the suit must be continued, in the Circuit Court, in the names of the surviving partners, without any reference to the real parties in interest. *Ib.*

7. (July, 1866.) Property in custody, involved in a replevin suit removed into this court, ought to be sold; and the proceeds should be brought into this court and deposited, on interest, to abide the result of the suit. *Dennistoun v. Draper*, 5 Blatchf. 336.

8. (April, 1869.) This court will not stay proceedings in a state court which are null and void; and it is forbidden by the fifth section of the act of March 2, 1793 (1 Stat. at Large, 334, 335), to stay valid proceedings in a state court. *Fisk v. Union Pacific Railroad Co.*, 6 Blatchf. 363.

9. (Jan., 1872.) Form of the order of this court, on the filing of the papers from the state court [on the removal of a cause]. *Dart v. McKinney*, 9 Blatchf. 359.

10. (March, 1872.) Before the removal of a cause into this court, from a state court, as against two of the defendants, under

the act of July 27, 1866 (14 Stat. at Large, 306), an injunction was granted in it, by the state court, on a full hearing, on notice, against such defendants. After the removal, they moved, in this court, to dissolve the injunction, on the same papers on which it was granted. *Held*, that leave to make such motion must be applied for and obtained, before it can be made. *Carrington v. Florida Railroad Co.*, 9 Blatchf. 468.

11. (Jan., 1876.) An action at law, commenced in a state court by summons and complaint, was removed into this court before issue joined. Before removal, an attachment had been issued in the suit, according to the law of the state, and a reference made to take the deposition of a witness, to be used on motion in the suit. After removal, the defendant entered a rule in this court, requiring the plaintiff to declare, and the plaintiff entered a rule in this court requiring the defendant to plead. The plaintiff now moved to set aside the first rule, and the defendant moved to set aside the second rule, and the plaintiff also moved for leave to proceed in the reference so made and pending, in accordance with the statute of New York. *Held*, that all three of the motions must be granted. *Bills v. Railroad Co.*, 13 Blatchf. 227.

12. As a complaint had been put in, in the state court, no further pleading on the part of the plaintiff was necessary. *Ib.*

13. Nor was there any occasion for the plaintiff to enter a rule to plead against the defendant, there being no such practice in the state court. *Ib.*

14. The provisions of secs. 646, 914, and 915 of the Revised Statutes of the United States, and of secs. 4 and 6 of the act of March 3, 1875 (18 Stat. at Large, 471, 472), show an intention to secure, in each state, one method of procedure in all common-law cases, and to attain that result by adopting, in general, the procedure of the state courts in the respective states. *Ib.*

15. The distinction between law and equity is preserved, both in substance and in procedure, and the provisions of positive statutes of the United States are not invaded; in the absence of such provisions, the state practice prevails. *Ib.*

16. (June, 1879.) The truth of averments made by such defendant corporation, in its petition for removal, to the effect that it has a defense arising under, or by virtue of, the Constitution or laws of the United States, cannot be inquired into or contro-

verted on a motion to remand the cause to the state court. *Texas v. Railroad Co.*, 3 Woods, 308.

17. (Nov., 1855.) Suits removed from the state courts, into the courts of the United States, are governed by the rules of the latter courts, and must be made to conform substantially to the modes of procedure observed therein, as in original cases. *Toucey v. Bowen*, 1 Biss. 81.

18. But where the state has adopted a code, the plaintiff will not be held to any technical observance of the mere form of action. *Ib.*

19. (Aug., 1876.) Where, in an action in a state court, an order was made for the production of sworn copies of books and papers, which was disobeyed, and contempt proceedings instituted, and an order made therein, and subsequently the cause was removed to the United States court, the latter court will recognize and enforce the order of the state court, in the contempt proceedings, as appertaining to the action removed. *Williams Mower and Reaper Co. v. Raynor*, 7 Biss. 245.

20. But if an appeal from the order in the state court has been taken to the Supreme Court [of the state], the United States court will hold in abeyance proceedings for the enforcement of the order in question, until the appeal is disposed of. *Ib.*

21. The fact that the contempt proceedings in the state court were not entitled in the cause removed, but in the name of the people of the state, will not prevent the United States court from reviewing the proceedings, if such proceedings were in reality in aid of the civil suit. *Ib.*

22. (1870.) Practice on the removal of causes, and requisites of affidavits for the removal. See note *post.* *Sands v. Smith*, 1 Dill. 290.

23. (1870.) The practice of the court, in causes removed from a state court, under the twelfth section of the Judiciary Act, stated. *McBratney v. Usher*, 1 Dill. 367.

24. (1871.) After a cause is removed from a state court to the Circuit Court of the United States, the latter court has the power, where such a practice is authorized by the state law, to entertain a motion to dissolve an attachment or discharge the attached property. *Garden City Mfg. Co. v. Smith*, 1 Dill. 305.

25. (Oct., 1880.) In a cause removed from the state to the federal court, the proceedings in the former will not be reviewed by the latter. *Brooks v. Farwell*, 1 McCrary, 132.

26. The state court having overruled motion to quash service of summons on a non-resident defendant, and ruled that the proper method of raising the question is by answer in the nature of a plea in abatement, and such answer having been there filed, the ruling will not be reviewed in this court. *Ib.*

27. (June, 1873.) A motion or proceeding to amend the records of a state court in a particular case must be made or brought in the state court, and cannot be removed to a national court. *King v. French*, 2 Sawyer, 441.

Removal. Waiver.

1. (Oct., 1873.) Where, after a suit has been properly removed from a state court into the Circuit Court of the United States, under the act of March 2, 1867, which allows such removal, in certain cases specified by it, "at any time before the final hearing or trial of the suit," the state court still goes on to adjudicate the case against the resistance of the party who got the removal, such action on its part is a usurpation, and the fact that such a party has contested the suit in such state court does not, after a judgment against him, on his bringing the proceedings here for reversal and direction to proceed no further, constitute a waiver on his part of the question of jurisdiction of the state court to have tried the case. *Insurance Co. v. Dunn*, 19 Wall. 214.

2. (Oct., 1879.) The ruling in *Insurance Company v. Dunn* (19 Wall. 214), that a party who, failing in his efforts to obtain a removal of a suit, is forced to trial loses none of his rights by defending against the action, reaffirmed. *Removal Cases*, 10 Otto, 457.

3. (Nov., 1854.) If a foreign corporation sued in a state court appear there and remove the suit to this court, under the twelfth section of the Judiciary Act of 1789 (1 Stat. at Large, 79), it is too late to object to the jurisdiction of the state court, or to take any exception to the process by which the corporation was brought in; and it is not a valid objection, that not being an inhabitant or found within the district, the suit could not have been commenced in this court. *Sayles v. Northwestern Ins. Co.*, 2 Curt. C. C. 212.

4. (March, 1872.) An action was removed into this court, from a state court, as against two of the defendants, under the

act of July 27, 1866 (14 Stat. at Large, 306). After the record of removal was filed in this court, the plaintiff pleaded anew, setting up, in his bill, the removal of the cause. After issue, the plaintiff moved to remand the cause to the state court, on the ground that it was not within the act. *Held*, that it was too late for the plaintiff to ask that the cause be remanded on motion. *Carrington v. Florida Railroad Co.*, 9 Blatchf. 467.

5. (Jan., 1876.) An action at law at issue in a state court was called for trial therein, and might, in the ordinary course, have been tried. The defendant applied for a postponement. This was refused by the court, except upon terms of the defendant's consenting to a reference. This he refused to do, but afterwards, and before the trial was actually commenced, he consented to a reference of the same for trial, to a person named. The order was made accordingly, and the immediate trial, which otherwise must have taken place, was thus avoided. The defendant then took proceedings to remove the cause into this court, under sec. 639, subd. 3, of the Revised Statutes of the United States, on the ground of prejudice or local influence. On a motion by the plaintiff to remand the cause to the state court, — *Held*, that the defendant had waived his right to claim a removal of the cause under the section above named. *Hanover National Bank v. Smith*, 13 Blatchf. 224.

6. A party to a suit may, in that particular suit, waive his right to remove the suit to the federal court; and he may make such waiver after the suit is brought, not only by a stipulation or agreement, but by conduct which is equivalent to a waiver. *Ib.*

7. (May, 1880.) There is no right of removal, under sec. 639 of the Revised Statutes, after a stipulation has been filed in the state court admitting the claim sued upon. *Keith v. Levi*, 1 McCrary, 343.

Issues of Fact, when to be tried by Jury.

REVISED STATUTES.

SEC. 648. The trial of issues of fact in the Circuit Courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section.

24 Sept., 1789, c. 20, s. 12, v. 1, p. 79.

3 March, 1865, c. 86, s. 4, v. 13, p. 501.

ACT OF MARCH 3, 1875.

SEC. 3. And the trial of issues of fact in the Circuit Courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury. [*Supplement to Rev. Stat., page 175.*]

1. (April, 1797.) PETERS, Justice: I have no doubt of the power of the court to order a *tales* in special jury causes. It might have been done, I think, under the act of assembly; but unquestionably it may be done under the act of Congress. . . .

TREDELL, Justice: The act of Congress seems to remove every difficulty. It makes no distinction (and the court can therefore make none) between the case of a special and of a common jury. If this provision had not existed, the subject would have occasioned much doubt in my mind. *Anonymous*, 2 Dall. 382.

2. (Feb., 1826.) Although it is the province of the court to construe written instruments, yet, where the effect of such instruments depends not merely on the construction and meaning of the instrument, but upon collateral facts *in pais* and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury. *Etting v. Bank of United States*, 11 Wheat. 59.

3. (Jan., 1832.) The Circuit Court cannot be called upon, when a case is before a jury, to decide on the nature and effect of the whole evidence introduced in support of the plaintiff's case, part of which is of a presumptive nature, and capable of being urged with more or less effect to the jury. *Crane v. Lessee of Morris*, 6 Pet. 598, 609.

4. Whenever evidence is offered to the jury, which is in its nature *prima facie* proof, or presumptive proof, its character, as such, ought not to be disregarded; and no court has a right to direct the jury to disregard it, or to view it under a different aspect from that in which it is actually presented to them. Whatever just influence it may derive from that character, the jury have a right to give it; and in regard to the order in which they shall consider the evidence in a cause, and the manner in which they shall weigh it, the law has submitted it to them to decide for themselves; and any interference with this right would be an invasion of their privilege to respond to matters of fact. *Id.*

5. (Jan., 1834.) It is an admitted principle, that a court of law has concurrent jurisdiction with a court of chancery, in cases of fraud. But when matters alleged to be fraudulent are investigated in a court of law, it is the province of a jury to find the facts, and determine their character. *Gregg v. Sayre*, 8 Pet. 244.

6. (Jan., 1835.) The District Court of the United States for the Eastern District of Louisiana adopted a rule which was analogous to the law of Louisiana, by which the security in an appeal bond shall have a summary judgment entered against him on notice, the appeal having failed. The judgment was entered, he not having appeared after notice, and the defendant came in subsequently and prayed a trial by jury, which was refused by the court. There was no error in this decision. *Hiriart v. Ballou*, 9 Pet. 156.

7. (Jan., 1846.) And in the submission to the jury of the question of fact, whether or not the evidence proved the marriage before that time, there was no interference with the province of the jury, or violation of any rule of law, the question having been left open for their finding. *Garrard v. Reynolds*, 4 How. 123.

8. (Dec., 1852.) Upon a trial in New York, a juror became ill, and was discharged before any evidence was given, and before the plaintiff's counsel had concluded his opening address. The court ordered another juror to be sworn, and proceeded with the trial. The defendant cannot object to this. It is the practice in New York, and the Circuit Court had a right to follow it. *Silsby v. Foote*, 14 How. 218.

9. (Dec., 1867.) The proceedings under the act relating to a seizure of land present a case of common-law jurisdiction, the proceedings in which are to be conformed, in respect to trial by jury and exceptions to evidence, to the course of the common law; and a final decision in which can be reviewed here only on writ of error. *Armstrong's Foundry*, 6 Wall. 766.

10. (Dec., 1869.) It is not sufficient to sustain a verdict for the plaintiff, that the testimony on which it was founded was known to the court by whom the jury was charged to find such a verdict. The evidence must be submitted to the jury, or the charge is erroneous. *Barney v. Schneider*, 9 Wall. 248.

11. The question, whether certain imported goods are similar to certain other goods described in the revenue law, for the pur-

poses of customs duties, is a mixed question of law and fact, and cannot, by the mere charge of the court, be wholly withdrawn from the jury. *Ib.*

12. (Dec., 1870.) Whether the advertisement of sale was such as the law required, is a mixed question of law and fact, and it must be submitted to the jury. *Cooley v. O'Connor*, 12 Wall. 391.

13. (Dec., 1871.) The fact that judges of the District and Supreme Courts of the territories are appointed by the President, under acts of Congress, does not make the courts which they are authorized to hold, "courts of the United States." Such courts are but the legislative courts of the territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the territories belonging to the United States. Accordingly, jurors summoned into them, under the acts of Congress, applicable only to the courts of the United States, *i. e.* courts established under the article of the Constitution which relates to the judicial power, are wrongly summoned; and a judgment on their verdict cannot, if properly objected to, be sustained. *Clinton v. Englebrecht*, 13 Wall. 434.

14. (Oct., 1873.) Evidence which may divert the attention of the jury from the real issue — that is to say, immaterial evidence — should be kept from the jury. *Lucas v. Brooks*, 18 Wall. 436.

15. (Oct., 1875.) Assuming the representations of the agent of the company, as to the non-assessment of the stock, to be a fraud which would avoid the contract, the question arises, whether the defendant discharged his duty in discovering the fraud, and repudiating the contract on that account, and not on account of another fraud not in issue. *Held*, that the plaintiff was entitled to the opinion of the jury on that precise question. *Upton v. Tribilcock*, 1 Otto, 45.

16. (Oct., 1875.) Where neither the evidence received nor offered tended to rebut the intent exhibited in the bills of lading, and confirmed throughout by the indorsement thereon, and the written instructions, to retain the ownership of the wheat until the payment of the draft, — *Held*, that there was no necessity of submitting to the jury the question, whether there had been a change of ownership. *Dows v. National Exchange Bank*, 1 Otto, 618.

17. (Oct., 1875.) The question, whether an imported article

is or is not known in commerce by the word or terms used in the act imposing the duty, is one of fact for the jury. *Tyng v. Grinnell*, 2 Otto, 467.

18. (Oct., 1876.) Where a commission merchant in Baltimore advanced to a pork packer, in Peoria, \$100,000, for which he was to receive interest at the rate of ten per cent per annum, and a fixed commission for the sale of the product, to be paid whether it was sold by the commission merchant or not, it was properly left to the jury to decide, on all the facts, whether or not the commissions were a cover for usury, or were an honest contract for commission business, in connection with use of money. *Cockle v. Flack*, 3 Otto, 344.

19. (Oct., 1876.) The court is not authorized to take from the jury the right of weighing the evidence bearing on controverted facts in issue. *Mutual Life Ins. Co. v. Snyder*, 3 Otto, 393.

20. (Oct., 1876.) A court is not required to submit evidence to the jury, unless it be of such a character as would warrant a verdict for the party producing it, and upon whom the burden of proof is imposed. *Com'rs of Marion County v. Clark*, 4 Otto, 278.

21. (Oct., 1878.) The jury, if they find for the plaintiff, cannot, in estimating his damages, consider the fees of counsel in prosecuting the suit. *Stewart v. Sonneborn*, 8 Otto, 187.

22. (Nov., 1812.) If, before a verdict be agreed on, one of the jury separate from his fellows by mistake, and afterwards rejoin them, and the verdict is then found, it is in the discretion of the court to allow the verdict to stand. *Burrill v. Phillips*, 1 Gall. 360.

23. (Oct., 1816.) A verdict which is repugnant or uncertain in a material point is void. *Stearns v. Barrett*, 1 Mason, 153.

24. The refusal of a court to amend a verdict is not matter which can be assigned for error. *Ib.*

25. (Oct., 1873.) It is not error to allow the plaintiff to remit an excess of interest found in the verdict, and then affirm the verdict so amended. *Paige v. Loring*, 1 Holmes, 275.

26. (Oct., 1849.) While the plaintiff's counsel, in a civil action, was opening the case to the jury, one of the jurymen impanelled was taken ill, so as to be unable to serve. *Held*, that it was proper for the court to discharge him, and to direct another jurymen to be drawn from the panel, in his stead. *Foote v. Silsby*, 1 Blatchf. 445.

27. (June, 1875.) Errors committed on the trial of an action at law, against the party who obtains a verdict, are merged in the verdict. *Schmeider v. Barney*, 13 Blatchf. 37.

28. (April, 1847.) A jury cannot allow the plaintiff in a patent case, as part of his actual damages, any expenditure for counsel fees or other charges, even though necessarily incurred to vindicate the rights given him by his patent, and though not taxable costs. *Stimpson v. The Railroads*, 1 Wall. Jr. 164.

29. (April, 1849.) No peremptory challenges are allowed in this court, to either side, where the jury has been already struck on both sides. *Blanchard v. Brown*, 1 Wall. Jr. 309.

30. (Oct., 1849.) Where a jury has had a case before it and disagreed, a second trial cannot be had by another jury from the residue of the panel. The case must go over, in order that it may be tried on a new *venire*. *Wilson v. Barnum*, 1 Wall. Jr. 347.

Charge to Jury.

1. (Feb., 1806.) The court, upon a jury trial, is bound to give an opinion, if required, upon any point relevant to the issue. *Douglass v. M'Allister*, 3 Cranch, 297.

2. (Feb., 1815.) If the facts stated in a special plea do not amount in law to a justification, yet if issue be joined thereon, and if the facts be proved as stated, it is error in the judge to instruct the jury that the facts so proved do not in law maintain the issue on the part of the defendant. *Otis v. Watkins*, 9 Cranch, 339.

3. (Jan., 1827.) Where the burden of proof of certain specific defenses set up by the defendant is on him, and the evidence presents contested facts, an absolute direction from the court, that the matters produced and read in evidence on the part of the defendant, were sufficient in law to maintain the issue on his part, and that the jury ought to render their verdict in favor of the defendant, is erroneous; and a judgment rendered upon a verdict purporting to have been given under such a charge will be reversed, &c. *United States v. Tillotson*, 12 Wheat. 180.

4. (Jan., 1832.) No court is bound, at the mere instance of the party, to repeat over to the jury the same substantial proposition of law, in every variety of form, which the ingenuity of counsel may suggest. It is sufficient if it is once laid down, in

an intelligible and unexceptionable manner. *Kelly v. Jackson*, 6 Pet. 622.

5. (Jan., 1838.) The court is not bound to give any hypothetical direction to the jury, and to leave them to find a fact, where no evidence of such fact is offered, nor any evidence from which it can be inferred. *M'Niel v. Holbrook*, 12 Pet. 84.

6. (Jan., 1838.) Where the items of an account stated were not disputed, but were admitted, and payment of the same demanded, it was not taking the question of fact, whether the account was a stated account, from the jury, for the court to instruct the jury that the account was a stated account. *Toland v. Sprague*, 12 Pet. 301.

7. (Jan., 1845.) A court is not bound to give instructions to the jury, in the terms required by either party; it is sufficient if so much thereof are given as are applicable to the evidence before the jury, and the merits of the case as presented by the parties. *Clymer v. Dawkins*, 3 How. 674.

8. (Jan., 1848.) Where a mortgage was given by a postmaster, to secure the post-office department, and the Circuit Court was asked to instruct the jury, that, according to the true interpretation of the mortgage, there was contained therein no stipulation or agreement to extend the time or preclude the government from suing the principal and sureties upon the postmaster's bond, and the court refused, upon the ground that the jury were the proper judges of the fact whether time was given, on a perusal of the mortgage; this was error in the court. It is the duty of the court to construe all written instruments given in evidence as a question of law. *United States v. Hodge*, 6 How. 279.

9. (Dec., 1851.) In some of the states, it is the practice for the court to express its opinion upon facts, in a charge to the jury. In these states, it is not improper for the Circuit Court of the United States to follow the same practice. *Mitchell v. Harmony*, 13 How. 115.

10. (Dec., 1857.) The charge of the court being founded on a hypothetical state of facts, of which there was no evidence, was erroneous. *United States v. Breitling*, 20 How. 252.

11. (Dec., 1861.) It is not erroneous for a judge of the Circuit Court to disregard the written points of counsel, and charge the jury in his own way, if he submits the facts fairly, and gives

his opinion fully on every question of law arising in the case. *Law v. Cross*, 1 Black, 533.

12. (Dec., 1867.) Refusal to grant specific prayers of a party for instruction is not error; the substance of the requested instructions being embraced in the instructions actually given. *Tome v. Dubois*, 6 Wall. 548.

13. (Dec., 1868.) It is not error to refuse to give instructions asked for, even if correct in point of law, provided those given cover the entire case, and submit it properly to the jury. *Laber v. Cooper*, 7 Wall. 566.

14. (Dec., 1868.) When evidence *tends* to prove a contract of a certain character, asserted by a party before a jury, a court should either submit the evidence on the point to the consideration of the jury, or if, in the opinion of the court, there are no material extraneous facts bearing on the question, and the contract relied on must be determined by a commercial correspondence alone, then interpret this correspondence, and inform the jury whether or not it proves the contract to be of the character contended for by the party. *Drakely v. Gregg*, 8 Wall. 242.

15. (Dec., 1869.) A court having fairly submitted to a jury the evidence in a case, and charged as favorably to a party as he could properly have asked, may, in the exercise of its discretion, refuse a request by that party, to charge as to which side the burden of proof belongs. *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641.

16. (Dec., 1869.) It is error to charge upon a state of facts of which no evidence has been offered. *Michigan Bank v. Eldred*, 9 Wall. 544.

17. (Dec., 1869.) A court properly declines to give instructions on a hypothetical state of facts. *Irvine v. Irvine*, 9 Wall. 618.

18. (Dec., 1869.) What is to be regarded as a reasonable time is, when the facts are clear, a matter of law. Where the proofs are conflicting, it is a mixed one of law and fact; and in such cases the court should instruct the jury upon the several hypotheses of fact insisted on by the parties. *Wiggins v. Burckham*, 10 Wall. 129.

19. (Dec., 1871.) Where there are no disputed facts in the case, the court may properly tell the jury, in an absolute form, how they should find. *Bevans v. United States*, 13 Wall. 57.

20. (Dec., 1871.) It is not error for a court to refuse to give

an extended series of instructions, though some of them may be correct in the propositions of law which they present, if the law arising upon the evidence is given by the court with such fullness as to guide correctly the jury in its findings; nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms, in particulars considered apart by themselves, which could not, when taken with the rest of the charge, have misled a jury of ordinary intelligence. *Railway Co. v. Whitton*, 13 Wall. 271.

21. (Dec., 1872.) On an issue of fact raised by a plea in abatement, where the defendant holds the affirmative of the issue, and where the evidence (introduced by the defendant himself), is all in favor of the plaintiff, positive and uncontradicted, the court properly instructs the jury when it directs them, as matter of law, to find the issue for the plaintiff. *Grand Chute v. Winegar*, 15 Wall. 355.

22. (Dec., 1872.) It is not error to charge that a party assured had no right to abandon, when the assurers have accepted the abandonment. *Insurance Co. v. Piaggio*, 16 Wall. 378.

23. Nor to refuse to charge that an abandonment made through error, and so accepted, is void if not warranted by the policy, when no evidence had been given of error by either side. *Ib.*

24. (Dec., 1872.) Where improper evidence has been suffered by the court to get before the jury, it is properly afterwards withdrawn from it. *Specht v. Howard*, 16 Wall. 564.

25. (Oct., 1873.) Prayers for instructions, which overlook facts of which there is evidence, or which assume as fact that of which there is no evidence, are properly refused. *Lucas v. Brooks*, 18 Wall. 436.

26. (Oct., 1873.) A court is not bound to comply with requests for charges, on points not raised by the evidence; nor when it has charged generally on the subject, in its general charge, to repeat itself by answering requests for the same instructions. *Klein v. Russell*, 19 Wall. 434.

27. (Oct., 1875.) The court below properly charged the jury, that, on the refusal of the party in possession of the wheat to deliver it to the owner, when thereto requested, the latter was entitled to recover the value thereof, with interest from the date of such refusal. *Dows v. National Exchange Bank*, 1 Otto, 618.

28. (Oct., 1876.) In the absence of any evidence whatever, to contradict or vary the case made by the plaintiff, it is not error for the court, when the legal effect of the plaintiff's evidence warrants a verdict for him, to so charge the jury. *Hendrick v. Lindsay*, 3 Otto, 143.

29. (Oct., 1876.) When instructions are asked in the aggregate, and there is anything exceptionable in either of them, the court may properly reject the whole. *Indianapolis & St. Louis Railroad Co. v. Horst*, 3 Otto, 291.

30. It is the settled law in this court that, if the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to give further instructions. *Ib.*

31. (Oct., 1876.) The court below properly refused to give an instruction declaring that a fact was established by unimpeached and uncontradicted testimony, when the record discloses that the testimony touching such asserted fact was conflicting. *Mutual Life Ins. Co. v. Snyder*, 3 Otto, 393.

32. (Oct., 1876.) Counsel cannot, in requests to the court below, assume the existence of facts, and ask a charge to the jury based upon such assumption. *New Jersey Mut. Life Ins. Co. v. Baker*, 4 Otto, 610.

33. (Oct., 1877.) A mere expression of opinion by a judge, upon a question of fact, is not a ground of error. *Transportation Line v. Hope*, 5 Otto, 297.

34. The action of the court below, in refusing to charge the jury as requested by the defendant, and the charge as given, considered, and held not to be erroneous. *Ib.*

35. (Oct., 1877.) To instruct upon assumed facts, to which no evidence applies, is error. *Railroad Co. v. Houston*, 5 Otto, 697.

36. (Oct., 1877.) The court is not bound, at the request of counsel, to give as instructions philosophical remarks copied from text-books, however wise or true they may be in the abstract, or however high the reputation of the authors. *Walker v. Johnson*, 6 Otto, 424.

37. The comments of the judge, in his charge to the jury, as to the circumstances under which the defendants might be entitled to damages against the plaintiff, cannot be a ground of error, when there was no such issue, and when the defendant could not have been thereby prejudiced. *Ib.*

38. (Oct., 1877.) Where the holder of the coupons, by producing them on the trial, and by other proofs, shows a clear right to recover, and the matters put in evidence by the county do not tend to defeat that right, it is not error to instruct the jury to find for him. *County of Macon v. Shores*, 7 Otto, 272.

39. (Oct., 1877.) Where the burden of proof is on the plaintiff, and the evidence submitted to sustain the issue is such that a verdict in his favor would be set aside, the court is not bound to submit the case to the jury, but may direct them to find a verdict for the defendant. *Herbert v. Butler*, 7 Otto, 319.

40. (Oct., 1878.) The jury should not be instructed to find for the defendant, unless the evidence is such as to leave no doubt that it is their duty to return a verdict in his favor. *Pence v. Langdon*, 9 Otto, 578.

41. (Oct., 1878.) Where, upon the undisputed facts of the case, the plaintiff is entitled to recover, it is not error for the court to instruct the jury to find for him. *Orleans v. Platt*, 9 Otto, 676.

42. Where the testimony is all one way, a party is not entitled to instructions which assume that it is otherwise. *Ib.*

43. (Oct., 1879.) It is error to submit to the jury to find a fact of which there is no competent evidence. *Manning v. Insurance Co.*, 10 Otto, 694.

44. (Oct., 1879.) No error is committed in refusing a prayer for instructions consisting of a series of propositions, presented as an entirety, if any of them should not be given to the jury. *Worthington v. Mason*, 11 Otto, 149.

45. (Oct., 1879.) In an action upon a life policy, where the defense is set up that some of the answers to the interrogatories contained in the application for insurance are untrue, and the evidence is conflicting, the court should not direct the jury to find for the defendant. *Moulor v. Insurance Co.*, 11 Otto, 708.

46. (Oct., 1880.) A prayer for instructions, which are presented as a whole, is properly refused if any of them is erroneous. *United States v. Hough*, 13 Otto, 71.

47. (Oct., 1880.) It is error to instruct touching the law applicable to facts of which there is no evidence. *Jones v. Van Benthuyssen*, 13 Otto, 87.

48. (Oct., 1880.) The ruling that where any portion of the charge to the jury is correct, an exception to the entire charge

will not be sustained, reaffirmed, and held to be applicable to a general exception taken to the report of a referee. *Boogher v. Insurance Co.*, 13 Otto, 90.

49. (Oct., 1880.) Where it is shown by the opening statement of counsel for the plaintiff that the contract on which the suit is brought is void, as being either in violation of law or against public policy, the court may direct the jury to find a verdict for the defendant. *Oscanyan v. Arms Company*, 13 Otto, 261.

50. A court is, in the due administration of justice, bound to refuse its aid to enforce such a contract, although its invalidity be not specially pleaded. *Id.*

51. (Oct., 1880.) Where, upon the undisputed facts of the case, the plaintiff is not entitled to recover, the court may instruct the jury to find a verdict for the defendant. *National Bank v. Insurance Co.*, 13 Otto, 783.

52. (June, 1824.) A court is not bound to give an opinion upon a point of law, which the evidence does not raise. *Gardner v. Collins*, 3 Mason, 398.

53. (Oct., 1843.) The court is never bound to give an instruction to a jury on a point of law, in the precise form and manner in which it is put by counsel, but only in such a manner as comports with the real merits and justice of the case. *Pitts v. Whitman*, 2 Story, 609.

54. (Nov., 1853.) If the jury send a written request for instructions to the court, when not in session, the court, after notice to the counsel, will reply in writing, if it deems it safe and proper to do so. *Norris v. Cook*, 1 Curt. C. C. 464.

55. (Oct., 1870.) Charging jury. State law and practice are not binding on the federal courts. *Hankin v. Squires*, 5 Biss. 186.

56. (July, 1874.) Where error in a charge relates to a matter which might have been corrected at the time, if the attention of the court had been called to it, the party failing so to do cannot take advantage of the error on motion for new trial. *Hamlin v. Pettibone*, 6 Biss. 167.

57. (March, 1874.) Where there is no evidence tending to prove a fact in issue essential to a recovery, the court, on motion of defendant made at the close of plaintiff's testimony, will advise the jury to find a verdict for the defendant. *Coolidge v. McCone*, 2 Sawyer, 571.

58. (Oct., 1875.) Where, upon the evidence, the court is satisfied that there should be no recovery, and that a verdict, if found for the plaintiff, would necessarily be set aside for want of evidence to justify it, the jury will be advised to find for the defendant. *Kielley v. Belcher Silver Mining Co.*, 3 Sawyer, 501.

Verdict. General.

1. (May, 1801.) A verdict will not be set aside on account of the alienage of a juror. *Semble*, that it is a cause of challenge, before he is sworn. *Hollingsworth v. Duane*, 4 Dall. 330.

2. (Feb., 1817.) Under such pleas, and the replication prescribed by statute, the mise was joined; the parties proceeded to trial, and the following general verdict was found, viz.: "The jury find that the demandant hath more mere right to hold the tenement, as he hath demanded, than the tenants, or either of them, have to hold the respective tenements set forth in their respective pleas, they being parcels of the tenement in the count mentioned." It was held that this verdict, being certain to a common intent, was sufficient to sustain a judgment. *Liter v. Green*, 2 Wheat. 306.

3. (Feb., 1826.) The verdict of a jury as to the *sanity* of the grantor at the time of executing such a conveyance would not be conclusive, the court being competent to determine for itself the degree of weakness, or of imposition, which will induce it to set aside the instrument. *Harding v. Handy*, 11 Wheat. 103.

4. (Dec., 1852.) Where the declaration in an action of *assumpsit* contained the following counts:—1. On a promissory note; 2. *Indebitatus assumpsit* for the hire of slaves; 3. An account stated; 4. *Quantum valebat* for the services of slaves; 5. Work and labor, goods sold and delivered, and money lent and advanced; 6. Money had and received; 7. An account stated; 8. A special agreement for the hire of slaves: and the defendant pleaded, 1. The general issue; 2. Statute of limitations; 3. Payment: and the jury found a verdict for "the defendant upon the issue joined as to the within note of \$456, and the within account,"—this verdict, although informal, was sufficient to authorize to enter a general judgment for the defendant. *Downey v. Hicks*, 14 How. 240.

5. (Dec., 1859.) Where several defendants are joined in an action of trespass, a verdict of acquittal against one, in order to make him a witness, can only be demanded where there is no evidence against him. *Castle v. Bullard*, 23 How. 172.

6. (Oct., 1880.) A verdict cures a defective statement of a title or cause of action. *Lincoln v. Iron Company*, 13 Otto, 412.

7. A verdict in assumpsit, the plea being *non assumpsit*, "that the defendant is guilty in manner and form as alleged in the declaration," is amendable, and judgment may be rendered thereon for the damages thereby assessed. *Id.*

Verdict. Special.

1. (Feb., 1806.) A finding by the jury which contradicts a fact admitted by the pleadings is to be disregarded. *M'Ferran v. Taylor*, 3 Cranch, 270.

2. (Feb., 1810.) A special verdict is defective which does not find whether the abandonment was in reasonable time. *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268.

3. (Feb., 1813.) A verdict "for the defendants, subject to the opinion of the court upon the points reserved," does not authorize an absolute judgment for the defendants, unless the points reserved and the opinion of the court thereon are stated on the record. *Smith v. Insurance Co.*, 7 Cranch, 434.

4. (Dec., 1857.) Every special verdict, in order to enable the appellate court to act upon it, must find the facts on which the court is to pronounce the judgment according to law, and not merely state the evidence of facts. In this manner it becomes a part of the record. *Suydam v. Williamson*, 20 How. 427.

5. (Dec., 1872.) Where, in ejectment, a special verdict has been found, and judgment entered on it, in the court below, for the plaintiff, which judgment, in an appellate court, is set aside with directions to enter judgment for the defendant, the special verdict cannot, on the plaintiff's bringing a second ejectment upon a subsequently acquired title, be used to establish a fact found in it, as, *ex. gr.*, the heirship of one of the parties under whom the plaintiffs claimed. *Smith v. McCool*, 16 Wall. 560.

6. (Oct., 1873.) On an information under the ninth section of the Internal Revenue Act of July 13, 1866, which enacts that any person who shall issue any instrument, &c., for the payment

of money, without the same being duly stamped, "with intent to evade the provisions of this act, shall forfeit and pay," &c., an intent to evade is of the essence of the offense; and no judgment can be entered on a special verdict which, finding other things, does not find such intent. *United States v. Buzzo*, 18 Wall. 125.

7. (Oct., 1855.) A special verdict which seemed to be incongruous in finding that, in any event, a defendant was entitled to certain items of allowance, and yet declaring that such allowances depended upon questions of law to be submitted to the decision of the court, construed as not restricting the authority of the court to pass upon the whole subject-matter, including those items. *United States v. Collier*, 3 Blatchf. 325.

Issues of Fact tried by the Court.

SEC. 649. Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record; file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. [See s. 700.]

3 March, 1865, c. 86, s. 4, v. 13, p. 501.

1. (Dec., 1857.) Where the judge files the statement of facts after the trial, *nunc pro tunc*, it is reasonable to presume that he had been requested to do so at the trial. *McGavock v. Woodlief*, 20 How. 221.

2. (Dec., 1869.) The court expresses itself as disposed to hold parties who, under the act of March 3, 1865, waive a trial by jury and substitute the court for the jury, to a reasonably strict conformity to the regulations of the act, if they desire to save to themselves all the rights and privileges which belong to them in trials by jury at the common law. *Flanders v. Tweed*, 9 Wall. 425.

3. Accordingly, in a case where there was no stipulation filed, for the waiver of a jury, and where the judge had filed his "statement of facts" three months after the date of the judgment rendered, — which statement, so irregularly filed, the court regarded as a nullity, — and no question of law was to be considered as

properly raised on the pleading, the court stated that, according to the general course of proceeding in former like cases, the judgment below should be affirmed. *Ib.*

4. However, in this case, — one from Louisiana, — it being apparent that both parties supposed that a case had been made up according to the practice of that state, but one not having been made up by the court, nor properly filed according to the requirements of the statute, so that, from that cause, the case, which it was meant by both court and parties to get here, could not be properly passed upon, the judgment, under the circumstances (the case being an important one), was not affirmed, but was reversed for mistrial, and remanded for a new trial. *Ib.*

5. (Oct., 1873.) It is not competent for a Circuit Court to determine, without the intervention of a jury, an issue of fact, in the absence of the counsel of the party, and without any written agreement to waive a trial by jury. *Morgan's Executor v. Gay*, 19 Wall. 81.

6. (Oct., 1879.) The concluding clause of the third section of the act entitled "An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," approved March 3, 1875 (18 Stat. part 3, 470), does not repeal the provision of the Revised Statutes authorizing the court to try, upon the stipulation of parties, issues of fact without the intervention of a jury. *Phillips v. Moore*, 10 Otto, 208.

7. (Oct., 1880.) A stipulation in writing, signed by the parties and filed with the clerk, that the cause shall be tried by the court, is equivalent to their waiver of a jury. *Bamberger v. Terry*, 13 Otto, 40.

8. (1874.) The act of March 3, 1865 (13 Stat. at Large, 501, s. 4), as to waiving a jury and trying issues of fact by the court, applies exclusively to the Circuit Courts. Its provisions do not extend to the District Courts. *Blair v. Allen*, 3 Dill. 101.

Finding. On Trial without a Jury.

1. (Dec., 1866.) Under the practice prevailing in the Circuit Courts of the United States, the finding of the facts by the court makes a case in the nature of a special verdict, and is conclusive as to those facts; and this although the petition sets forth a

different state of facts, which are neither confessed nor denied by the answer. *Saulet v. Shepherd*, 4 Wall. 502.

2. (Dec., 1869.) The fourth section of the act of March 3, 1865, establishes the mode in which parties may submit cases to the court without a jury, and the manner in which a review of the law of such cases may be had in this court. *Norris v. Jackson*, 9 Wall. 125.

3. The special finding of the facts, mentioned in that statute, is not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties. *Ib.*

4. If the finding of facts be general, only such rulings of the court, *in the progress of the trial*, can be reversed as are presented by a bill of exceptions. *Ib.*

5. In such cases, a bill of exceptions cannot be used to bring up the whole testimony for review, any more than in a trial by jury. *Ib.*

6. Objections to the admission or rejection of evidence, or to such rulings or propositions of law as may be submitted to the court, must be shown by bill of exceptions. *Ib.*

7. If the parties desire a review of the law of the case, they must ask the court to make a special finding which raises the question, or get the court to rule on the legal propositions which they present. *Ib.*

8. (Dec., 1869.) When a court below makes a special finding, this court will not go into an examination of the evidence on which it was founded, to ascertain whether or not it was right. The finding is equivalent to a special verdict. *Copelin v. Insurance Co.*, 9 Wall. 461, 462.

9. (Dec., 1870.) *Norris v. Jackson* (9 Wall. 125) and *Flanders v. Tweed* (id. 425) affirmed; and it is again decided that under the act of March 3, 1865, authorizing parties to submit the issues of fact in civil cases, to be tried and determined by the court, this court will not review a general finding, upon a mass of evidence brought up; and that if a party desires to have the finding reviewed, he must have the court find the facts specially, so that the case may come here as on a special verdict or case stated. *Coddington v. Richardson*, 10 Wall. 516.

10. (Dec., 1871.) Under the act of March 3, 1865, authorizing the trial of facts by Circuit Courts, the court must itself

find the facts, in order to authorize a writ of error to its judgment. A statement of facts signed by counsel and filed, after the judgment, is insufficient. *Bethell v. Mathews*, 13 Wall. 1.

11. Where, in a case tried under the above-mentioned act, the record, owing to the manner in which things have been done below, presents a case as of a judgment rendered on a general verdict in favor of the defendant in error, and does not present any question arising on the pleadings, nor any ruling against the plaintiff in error, the judgment will be affirmed. *Ib.*

12. (Dec., 1871.) Under the act of Congress of March 3, 1865, authorizing the trial of facts by the Circuit Courts, and enacting that the findings of the court upon them shall have the same effect as the verdict of a jury, this court, sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of evidence. If the court chooses to find generally, for one side or the other, instead of making a special finding of the facts, the losing party has no redress on error, except for the wrongful admission or rejection of evidence. *Dirst v. Morris*, 14 Wall. 484, 485.

13. (Oct., 1873.) The doctrine reasserted, as often adjudged in this court before, that where a case is tried by the Circuit Court, under the act of March 3, 1865, if the finding be a general one, this court will only review questions of law arising in the progress of the trial and duly presented by a bill of exceptions, or errors of law apparent on the face of the pleadings. *Insurance Co. v. Folsom*, 18 Wall. 237.

14. Under the act above named, the Circuit Court is not required to make a special finding. *Ib.*

15. (Oct., 1874.) In an action in the courts of the Territory of Montana, for the recovery of the possession of personal property, — the Code of Civil Procedure in which territory provides that the judgment in such an action may be for the possession of the property, or the value thereof in case a delivery cannot be had, and damages for the detention, — while it is true that there can be no judgment for the value if there can be a delivery of the property, yet it is not true that a judgment is necessarily erroneous if the alternative is not expressed upon its face. The court must be satisfied that the delivery cannot be made, before it can adjudge absolutely the payment of money. But, if so satisfied, it may so adjudge. A special finding that a delivery cannot

be made is not necessary. An absolute judgment for the money is equivalent to such a finding. *Boley v. Griswold*, 20 Wall. 486.

16. (Oct., 1874.) When a court, in a case where a jury is waived, under the act of March 3, 1865 (see Revised Statutes of the United States, sec. 649), and the case is submitted to it without the intervention of a jury, finds *as a fact* that a conveyance was made to certain persons as trustees, and then finds *as a conclusion of law* that the legal title remained in those trustees, that finding does not bind this court as a finding of fact; and if it was the duty of the trustees to have reconveyed to the grantor, as stated in the first paragraph of this syllabus, this court will reverse the judgment, founded on that conclusion. *French v. Edwards*, 21 Wall. 147.

17. (Oct., 1878.) When the record of a suit is duly certified upon an appeal to a District Court in Utah, and the latter states its findings of fact and its conclusions of law separately, and appeals from its order refusing a new trial and from its judgment are taken to the Supreme Court of that territory, the statute whereof requires a statement, to be settled by the judge who heard the cause, specifically setting forth the "particular errors or grounds" relied on, and containing "so much of the evidence as may be necessary to explain them, and no more;" and where a statement settled and signed by him, and annexed to the copy of the order refusing a new trial, contains all the testimony and written proofs and allegations of the parties certified up to the District Court, upon which the trial was had, and it was stipulated that the statement might be used on an appeal from the judgment to the said Supreme Court, — *Held*, 1. That the proceeding was thus made to conform to the Practice Act of Utah, and that the latter court was called upon to decide whether the evidence was sufficient to sustain the findings of fact, and, if it was, whether they would support the judgment. *Stringfellow v. Cain*, 9 Otto, 610.

18. (Oct., 1879.) *Semble*, that the finding of a referee should have the precision of a special verdict, specifying with distinctness the facts, and not leaving them to be inferred. *Lumber Co. v. Buchtel*, 11 Otto, 633.

19. (Nov., 1869.) Where an action at law is tried by this court, without a jury, under the provisions of the fourth section of the act of March 3, 1865 (13 Stat. at Large, 501), it is discretion-

ary with the court to make either a general or a special finding upon the facts. *Clement v. Phenix Ins. Co.*, 7 Blatchf. 51.

20. The proper mode of procedure on such a trial, in respect to propounding propositions of law, and to passing thereon, and to excepting to rulings thereon, with a view to a writ of error or an appeal, stated. *Ib.*

21. It is not necessary that there should be a special finding on the facts in order to secure to the defeated party the right to move for a new trial, or to have a review by the Supreme Court, or the full benefit of any exception taken by him at the time to any ruling of the court, on any question of law in the progress of the trial. *Ib.*

22. A trial by the court, without a jury, is not concluded until the formal finding of the court upon the facts is made. *Ib.*

23. The danger of prejudice to the successful party, by a special finding of facts, on a trial by the court, in case of a review by the Supreme Court, stated. *Ib.*

24. (Nov., 1871.) Where this court, after the waiver of a trial by jury, tries a case without a jury, it is not required to make a special finding upon the facts. *Folsom v. Mercantile Mutual Ins. Co.*, 9 Blatchf. 201.

25. (Jan., 1880.) After a general finding of fact, judgment thereon, and the lapse of a term, special findings cannot be added to, or substituted for, the general finding. *Marye v. Strouse*, 6 Sawyer, 205.

26. A Circuit Court is not bound to make a special finding. *Ib.*

Division of Opinion in Civil Causes; Decision by Presiding Judge.

REVISED STATUTES.

SEC. 650. Whenever, in any civil suit or proceeding in a Circuit Court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, there occurs any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time being.

1 June, 1872, c. 255, s. 1, v. 17, p. 196.

1. (May, 1879.) Under secs. 650, 652, and 693 of the Revised Statutes of the United States, no civil suit, where there is

a certificate of division of opinion, can be taken to the Supreme Court, except upon final judgment, and by writ of error or appeal ; and, under sec. 691, as amended by sec. 3 of the act of Feb. 16, 1875 (18 Stat. at Large, 316), no final judgment or decree can be re-examined unless the matter in dispute exceeds \$5,000. *Robbins v. Fireman's Fund Ins. Co.*, 16 Blatchf. 232.

Division of Opinion in Criminal Causes ; Certificate.

REVISED STATUTES.

SEC. 651. Whenever any question occurs on the trial or hearing of any criminal proceeding before a Circuit Court upon which the judges are divided in opinion, the point upon which they disagree shall, during the same term, upon the request of either party, or of their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court at their next session ; but nothing herein contained shall prevent the cause from proceeding, if, in the opinion of the court, further proceedings can be had without prejudice to the merits. Imprisonment shall not be allowed nor punishment inflicted in any case where the judges of such court are divided in opinion upon the question touching the said imprisonment or punishment. [See s. 697.]

29 April, 1802, c. 31, s. 6, v. 2, p. 159.

1 June, 1872, c. 25, s. 1, v. 17, p. 196.

1. (Feb., 1812.) The defendant was indicted under the act to enforce the embargo laws, passed the 9th January, 1809, for loading on carriages, within the district of Vermont, nineteen barrels of *pearl-ashes*, with intent to transport the same without the United States ; to wit, into the province of Canada.

On a plea of not guilty, the jury returned the following written verdict, which was recorded : —

“ The jury find that the said John Tyler is guilty of the charge alleged against him in said indictment, and that the said *pot-ashes* were worth two hundred and eighty dollars.”

The defendant moved in arrest of judgment, because the verdict was not sufficiently certain as to the value of the property charged in the indictment, the same having found the value of *pot-ashes*, whereas the defendant was indicted for the intention of exporting *pearl-ashes*.

Upon this motion, the judges were opposed in opinion, the same has been certified unto this court for its direction in the

premises. . . . It must, accordingly, be certified to the court below, that it proceed to render judgment for the United States on the verdict aforesaid. *United States v. Tyler*, 7 Cranch, 285, 286.

2. (Feb., 1820.) The district judge cannot sit in the Circuit Court in a cause brought by writ of error from the District to the Circuit Court, and the cause cannot, in such a case, be brought from the Circuit Court to this court, upon a certificate of a division of opinion of the judges. *United States v. Lancaster*, 5 Wheat. 434.

3. (Feb., 1821.) A division of the judges of the Circuit Court, on a motion for a new trial, in a civil or criminal case, is not such a division of opinion as is to be certified to this court for its decision, under the sixth section of the Judiciary Act of 1802, ch. 291. *United States v. Daniel*, 6 Wheat. 542.

4. (Jan., 1835.) Indictment upon the act of Congress of March 3, 1823, for the punishment of frauds committed against the government of the United States.

After the whole case had been laid before the Circuit Court of the United States, the counsel for the prisoner moved the court to instruct the jury that the evidence did not conduce to prove the offense charged under the acts of Congress; which was opposed by the United States; and on this question the judges were divided, and their opinions opposed. The question and disagreement were stated, and ordered to be certified to the Supreme Court. *United States v. Bailey*, 9 Pet. 267.

5. The language of the sixth section of the act to amend the judicial system of the United States, which provides for the removal of cases from the Circuit Court to the Supreme Court, when the judges of the Circuit Court are opposed in opinion, shows conclusively that Congress intended to provide for a division of opinion on single points, which frequently occur in the trial of a cause; not to enable a Circuit Court to transfer an entire cause into the Supreme Court, before a final judgment. A construction which would authorize such transfer would counteract the policy which forbids writs of error or appeals until the judgment or decree be final. *Id.*

6. The certificate of the judges leaves no doubt that the whole cause was submitted to the Circuit Court by the motion of the counsel of the prisoner. It has been repeatedly decided that the whole cause cannot be adjourned on a division of the judges; and this is a case of that description. *Id.*

7. (Jan., 1847.) When a case is brought up to this court on a certificate of division of opinion, the point upon which the difference occurs must be distinctly stated. *United States v. Briggs*, 5 How. 208.

8. Where there was a demurrer, upon three grounds, to an indictment, it is not enough to certify that the court was divided in opinion whether or not the demurrer should be sustained. *Ib.*

9. (Dec., 1861.) The only mode of bringing a criminal case into this court is upon a certificate of the judges of the Circuit Court that their opinions are opposed upon a question raised at the trial. *Ex parte Gordon*, 1 Black, 503.

10. No party has a right to ask for such a certificate, nor can it be made, consistently with the duty of the court, if the judges are agreed and do not think there is doubt enough upon the question to justify them in submitting it to the judgment of this court. *Ib.*

11. (Dec., 1868.) This court cannot take cognizance, under the Judiciary Act of 1802, of a division of opinion between the judges of the Circuit Court, upon a *motion to quash an indictment*. *United States v. Rosenburgh*, 7 Wall. 580.

12. (Oct., 1834.) The only mode contemplated by the laws of the United States, to revise the opinions of the judges of the Circuit Court in criminal cases, is, when the judges are divided in opinion at the trial, and then the point of division may be certified to the Supreme Court for a final decision, under the Judiciary Act of 1802, ch. 31, s. 6. *United States v. Gibert*, 2 Sumn. 22.

13. (Dec., 1868.) The practice stated, in regard to certificates of division of opinion, in criminal cases tried in the Circuit Court, where the court is held by two judges. *United States v. Fullerton*, 6 Blatchf. 275.

14. The probability that difficult and important questions of law will arise on the trial of an indictment in the Circuit Court, will not ordinarily justify the postponement of the trial, so as to await the holding of the court by two judges, with a view to a certificate of division of opinion. *Ib.*

Division of Opinion in Civil Causes; Certificate.

REVISED STATUTES.

SEC. 652. When a final judgment or decree is entered in any civil suit or proceeding before any Circuit Court held by a circuit justice and

a circuit judge or a district judge, or by a circuit judge and a district judge, in the trial or hearing whereof any question has occurred upon which the opinions of the judges are opposed, the point upon which they so disagreed shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record. [See s. 698.]

29 April, 1802, c. 31, s. 6, v. 2, p. 159.

1 June, 1872, c. 255, s. 1, v. 17, p. 196.

1. (Feb., 1804.) If a question upon which the judges below differ in opinion be certified to this court, and here decided, the parties are not precluded from a writ of error on the final judgment, when the *whole* cause will be before the court. *Ogle v. Lee*, 2 Cranch, 33.

2. (Feb., 1805.) This was a question *certified* from the Circuit Court for the fifth circuit, holden in the Virginia district, on which the opinions of the judges of that court were opposed.

The certificate sets forth that in this cause it occurred as a question whether Hepburn & Dundas, the plaintiffs in this cause, who are citizens and residents of the District of Columbia, and are so stated in the pleadings, can maintain an action in this court, against the defendant, who is a citizen and inhabitant of the commonwealth of Virginia, and is also stated so to be in the pleadings, or whether, for want of jurisdiction, the said suit ought not to be dismissed.

The opinion to be certified to the Circuit Court is, that that court has no jurisdiction in the case. *Hepburn v. Ellzey*, 2 Cranch, 445, 452.

3. (Feb., 1818.) This court has no jurisdiction of causes brought before it, upon a certificate of a division of opinions of the judges of the Circuit Court for the District of Columbia. The appellate jurisdiction of this court, in respect to that court, only extends to the final judgments and decrees of the latter. *Ross v. Triplett*, 3 Wheat. 600.

4. (Feb., 1825.) This cause came on to be heard on the questions certified from the United States court for the seventh circuit and district of Kentucky, and was argued by counsel: on consideration whereof, this court is of opinion that the statutes of Kentucky in relation to executions, which are referred to in the questions certified to this court, on a division of opinion of the said judges of the said Circuit Court, are not applicable to

executions which issue on judgments rendered by the courts of the United States; which is directed to be certified to the said Circuit Court. *Wayman v. Southard*, 10 Wheat. 1, 50.

5. (Jan., 1827.) This court cannot take jurisdiction of a question, on which the opinions of the judges of the Circuit Court are opposed, where the division of opinions arises upon some proceeding subsequent to the decision of the cause in that court. *Devereaux v. Marr*, 12 Wheat. 212.

6. (Jan., 1830.) Where the point on which the judges of the Circuit Court divided in opinion was not certified, but the point of difference was to be ascertained from the whole record, the court refused to take jurisdiction of the case. *Wolf v. Usher*, 3 Pet. 269.

7. (Jan., 1830.) Where the whole cause, and not a point or points in the cause, has been adjourned from the Circuit Court to this court, the case will be remanded to the Circuit Court. *Saunders v. Gould*, 4 Pet. 392.

8. (Jan., 1832.) Upon a motion of the defendants a rule was given in the Circuit Court of the United States for the District of Ohio, on the marshal, to show cause why the taxation of costs in the case, upon execution, should not be reversed and corrected, in respect to the marshal's poundage taxed against the defendants. The judges of the Circuit Court were divided in opinion upon the questions of costs presented on the hearing of the rule, and certified the division to this court. *Held*, that this court had not jurisdiction of the cause. *Bank of United States v. Green*, 6 Pet. 26.

9. (Jan., 1832.) This case came before the court, in the first instance, on a certificate of division in opinion in the Circuit Court of the United States for the Southern District of New York.

Mr. JUSTICE STORY: In the cases referred to, the division of the court took place on the trial of the cause before the jury.

Mr. CHIEF JUSTICE MARSHALL suggested that the case might be brought on, if the parties would agree that it should stand as if a judgment had been given by the Circuit Court, on the exceptions. The case, he said, could not be heard on a difference in opinion of the judges of the court on a motion for a new trial. *Grant v. Raymond*, 6 Pet. 218, 220, 221.

10. (Jan., 1836.) The defendant in an action of detinue died previous to the return-day of the term, and at the term his death

was suggested, and a *scire facias* was issued to his executors, to a subsequent term, and the plaintiff moved the court to revive the suit against them ; which motion, on argument, was overruled, and the suit abated. On a day afterwards, in the same term, the plaintiff's attorney moved the court to rescind the order refusing to revive the suit ; and upon this motion the judges were opposed in opinion, whether the action could be revived against the personal representatives of the defendant ; which division was certified to the Supreme Court. *Held*, that the question cannot be brought up on a certificate of division. There was not, in strictness, any cause in court. The insurmountable objection is, that the granting or refusing the motion was a matter resting in the discretion of the court, and did not present a point that could be certified under the act of Congress. Although the words of the act are general, that whenever any question shall occur before a Circuit Court, upon which the opinion of the judges shall be opposed, the point shall be certified, &c., yet it is very certain that this cannot embrace every question that may arise in the progress of a cause, from its commencement. There may be many motions made in the different stages of a cause, before trial, that could not be brought here under a certificate of division, — such as motions for amendments, for commissions, for continuances, &c., and various other motions that arise in the progress of a suit, — which, if brought up in this manner, would occasion great delay and expense. These, and all other questions resting in the discretion of the Circuit Court, are not to be reviewed here. *Davis v. Braden*, 10 Pet. 286.

11. The questions which may be certified are those which may arise on the trial of a case, and are such as may be presented upon the final hearing of a cause, or pleas to the jurisdiction of the court. The motion in the present case does not stand on stronger grounds than a motion for a new trial ; and it has been decided in this court, in the case of the *United States v. Daniel* (6 Wheat. 542 ; 5 Cond. Rep. 170), that a division of opinion upon such a motion cannot be brought here by certificate of a division of opinion in the Circuit Court ; and the reason assigned is, that the granting or refusing a new trial is a mere matter of discretion ; and the refusal, although the grounds of the motion be spread upon the record, is no sufficient cause for a writ of error. The effect of the division is, that the motion is lost : so in the

present case, the effect of the division of opinion is, that the motion is lost, and the plaintiff is driven to a new suit. *Ib.*

12. The court does not mean to decide, definitively, that no question can be brought here upon a certificate of a division of opinion, unless the point arose upon the trial of the cause; but are very much induced to think that such is the true construction of the act; but from the general words used, cases may possibly arise that we do not foresee. *Ib.*

13. (Jan., 1836.) The question whether a plaintiff in ejectment shall be permitted to enlarge the term in the demise, in an action of ejectment, is one within the discretion of the court to which a motion for the purpose is submitted, and cannot be certified to the Supreme Court, if the judges of the Circuit Court are divided in opinion on the motion, under the provisions of the act of Congress of the 29th of April, 1802. *Smith v. Vaughan*, 10 Pet. 366.

14. (Jan., 1836.) Questions respecting the practice of the Circuit Courts in equity causes, which depend upon the exercise of the sound discretion of the court, in the application of the rules which regulate the course of equity proceedings, to the circumstances of such particular case, are not questions which can be certified on a division of opinion of the judges of the Circuit Court, under the act of 1802, ch. 32. *Packer v. Nixon*, 10 Pet. 408.

15. (Jan., 1838.) Where a case is certified from a Circuit Court of the United States, the judges of the Circuit Court having differed in opinion upon questions of law, which arose on the trial of the cause, the Supreme Court cannot be called upon to express an opinion on the whole facts of the case, instead of upon particular points of law, growing out of the same. *Adams v. Jones*, 12 Pet. 207.

16. (Jan., 1838.) The intention of Congress in passing the act authorizing a division of opinion of the judges of the Circuit Courts of the United States to be certified to the Supreme Court was, that a division of the judges of the Circuit Court, upon a single and material point in the progress of the cause, should be certified to the Supreme Court for its opinion, and not the whole cause. When a certificate of division brings up the whole cause, it would be, if the court should decide it, in effect, the exercise of original, rather than appellate, jurisdiction. *White v. Turk*, 12 Pet. 238.

17. The case of the *United States v. Bailey* (9 Pet. 267) cited and approved. *Ib.*

18. (Jan., 1848.) Where it is evident from the record that the whole case has been sent up to this court, upon a certificate of division in opinion, the case must be dismissed for want of jurisdiction. *Nesmith v. Sheldon*, 6 How. 41.

19. (Jan., 1849.) Although the motion under argument in the Circuit Court was addressed to its discretion, yet if the questions which arose, and upon which the judges differed, involved the right of the matter, this court will entertain those questions. *United States v. Chicago*, 7 How. 185.

20. So, also, where the questions are several in number, and so material as to decide the whole case, this court will not dismiss them, provided they appear to have arisen at one time, at one stage of the cause, and to have involved little beyond one point. *Ib.*

21. (Jan., 1849.) Where an appeal from a Circuit Court, sitting in chancery, is brought up to this court upon a certificate of division in opinion, and the certificate states that the court was not able to agree in opinion, one of the judges being of opinion that a decree should be rendered for the complainants, and the other that a decree should be rendered for the defendants, this was not such a distinct statement of the point or points upon which the judges differed as to give the court jurisdiction. *Sadler v. Hoover*, 7 How. 646.

22. The appeal must, therefore, be dismissed for want of jurisdiction. *Ib.*

23. (Jan., 1850.) The following question, sent up to this court upon a certificate of division in opinion between the judges of the Circuit Court, viz.: "Whether, according to the true construction of the Woodworth patent, as amended, the machines made or used by the defendant at the time of filing the bill, or either of them simply, do or do not infringe the said amended letters-patent,"—is a question of fact, over which this court has no jurisdiction. *Wilson v. Barnum*, 8 How. 258.

24. The jurisdiction given to it by statute, in certified cases, only extends to points of law. *Ib.*

25. (Dec., 1850.) Where it appears that the whole case has been certified *pro forma*, in order to take the opinion of this court, without any actual division of opinion in the Circuit

Court, the practice is irregular, and the case must be remanded to the Circuit Court, to be proceeded in according to law. *Webster v. Cooper*, 10 How. 54.

26. The decision of this court in the case of *Nesmith and others v. Sheldon* (6 How. 41) affirmed. *Ib.*

27. (Dec., 1855.) Where questions are certified up to this court, in consequence of a division in opinion between the judges of the Circuit Court, they must be questions of law and not questions of fact; not such as involve or imply conclusions or judgment by the judges upon the weight or effect of testimony or facts adduced in the cause. *Dennistown v. Stewart*, 18 How. 565.

28. The questions must also be distinctly and particularly stated with reference to that part of the case upon which such questions shall have arisen. *Ib.*

29. The points stated must be single, and must not bring up the whole case for decision. *Ib.*

30. (Dec., 1856.) Where a question was certified from the Circuit Court to this court, viz. whether a certain letter, written by the cashier of a bank, without the knowledge of the directory, though copied at the time of its date, in the letter-book of the bank, was a legal and valid act of authority; and the record afforded no evidence relevant to the acts and authority of the cashier, or to the practice of the bank in ratifying or rejecting similar acts, — this court cannot answer the question, and the case must be remanded to the Circuit Court, to be tried in the usual manner. *United States v. City Bank*, 19 How. 385.

31. (Dec., 1861.) In a case where the judges of the Circuit Court have divided in opinion upon several questions, one of them being whether the court has jurisdiction, the question of jurisdiction must be determined before any opinion can be expressed on the others. *Silliman v. Bridge Co.*, 1 Black, 582.

32. If the judges of this court, as well as the court below, are equally divided on the question of jurisdiction, the case will be remitted for such further action as may be required by law and the rules of court. *Ib.*

33. Where the record (of an equity case) goes down in this condition, it is the established rule to dismiss the bill and leave the plaintiff to his remedy by appeal. *Ib.*

34. Whether the evidence is sufficient to prove an averment

in the pleadings is a question of fact, and cannot, therefore, be brought into this court upon a certificate of division. *Ib.*

35. (Dec., 1862.) The power of the Supreme Court of the United States, to revise the proceedings of a Circuit Court, in a case brought up on a certificate of division, is strictly confined to the questions stated in the certificate. *Ward v. Chamberlain*, 2 Black, 430.

36. (Dec., 1865.) Under the act of April 29, 1802 (s. 6), providing "that whenever *any question* shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, *the point* upon which the disagreement shall happen shall . . . be certified . . . to the Supreme Court, and shall by the said court be finally decided," — the court will not, even by consent of parties, take jurisdiction, unless the certificate of division present, in a precise form, a point of law upon a part of the case settled and stated. Hence, where the record stated certain facts, and, with this statement, presented the testimony of numerous witnesses, which was directed to the establishment of others, — the whole case being, in fact, brought up with a purpose, apparently, that this court should decide both fact and law, and the question certified was whether in point of law, upon the facts as stated and *proved*, the action could be maintained, — the court dismissed the case as not within its jurisdiction. *Daniels v. Railroad Co.*, 3 Wall. 250.

37. (Dec., 1865.) Where the judges of the Circuit Court certify a division of opinion to this court for its judgment, this court will not return an answer, unless the question raised involve a distinct legal point, and sufficient facts are set forth to show its bearing on the rights of the parties. Hence, no answer will be given to a proposition merely abstract. *Havemeyer v. Iowa County*, 3 Wall. 294.

38. (Dec., 1866.) This court cannot take jurisdiction, on a certificate of division, in a case where the question certified is one of fact, and can only be determined by an examination of the evidence in the record. *Brobst v. Brobst*, 4 Wall. 2.

39. (Dec., 1870.) Where, on a certificate of division from a Circuit Court, this court is equally divided in opinion, the case will be remitted to the court below, for the purpose of enabling it to take such action as it may be advised. *Hannauer v. Woodruff*, 10 Wall. 482.

40. (Oct., 1846.) The judges of this court, on a motion for a new trial, cannot certify to a division of opinion at the trial itself, unless both were present; and it will not, it seems, enable the parties to carry the case up, if certifying to it in respect to the motion for a new trial. *Taylor v. Carpenter*, 2 Woodb. & M. 1.

Business of the Circuit Court for the Two Districts of Missouri transferred, how.

REVISED STATUTES.

SEC. 653. The Circuit Court for the Eastern District of Missouri is vested with full and complete jurisdiction to hear, determine, and dispose of, according to the usual course of judicial proceedings, all suits, causes, motions, and other matters which were pending in the Circuit Court of the United States in and for the districts of Missouri at the time the said Circuit Court for the Eastern District of Missouri was created, on the eighth day of June, eighteen hundred and seventy-two, and also all other matters which have since arisen that pertain to said suits or causes, and also to make all orders and issue of¹ all processes which said Circuit Court of the United States in and for the districts of Missouri might have done if it had not ceased to exist; and said Circuit Court for said Eastern District of Missouri is vested with jurisdiction and authority to do all and singular that may in the due course of judicial proceedings pertain to any of said suits, causes, or unfinished business, as fully as the said Circuit Court in and for the Districts of Missouri might have done if said Circuit Court had not ceased to exist.

25 Feb., 1873, c. 200, s. 1, v. 17, p. 476.

Process issued out of Former Circuit Court for Missouri.

REVISED STATUTES.

SEC. 654. The service of process, mesne or final, issued out of said Circuit Court of the United States in and for the districts of Missouri, which service was had after the eighth day of June, eighteen hundred and seventy-two, and all levies, seizures, and sales made thereunder, also all service, seizures, levies, and sales made under any process which issued as out of said court after the said eighth day of June, eighteen hundred and seventy-two, are made valid, and all said processes are to be deemed returnable to said Circuit Court of the United States in and for the Eastern District of Missouri as of the return-day thereof.

25 Feb., 1873, c. 200, s. 2, v. 17, p. 476.

¹ The word *of* in the Roll redundant.

Transfer of Cases between Eastern and Western Districts.

REVISED STATUTES.

SEC. 655. Either of the Circuit Courts for the Eastern and for the Western District of Missouri may order any suit, cause, or other matter pending therein, and commenced prior to the creation of said new court, to be transferred for trial or determination to the other of said Circuit Courts when, in the opinion of the court, said transfer ought to be made; and the court to which said transfer is made shall have as full authority and jurisdiction over the same from the date the certified transcript of the record thereof is filed, as if the same had been originally pending therein.

25 Feb., 1873, c. 200, s. 3, v. 17, p. 476.

Custody of Books, Papers, &c., of Circuit Court of Missouri.

REVISED STATUTES.

SEC. 656. That the clerk of the Circuit Court for the Eastern District of Missouri, and his successors in office, shall have the custody of all records, books, papers, and property belonging or in any wise appertaining to said Circuit Court of the United States in and for the districts of Missouri, and, as such custodians and the successors of the clerk of said last-named court, they are hereby invested with the same powers and authority with respect thereto as the clerk thereof had during the existence of said last-named Circuit Court. Said Circuit Court for the Eastern District of Missouri is hereby made the successor of said Circuit Court of the United States in and for the districts of Missouri as to all suits, causes, and unfinished business therein or in any wise pertaining thereto, except as hereinbefore provided.

25 Feb., 1873, c. 200, s. 4, v. 17, p. 476.

Circuit Court for Southern District of New York, how limited.

REVISED STATUTES.

SEC. 657. The original jurisdiction of the Circuit Court for the Southern District of New York shall not be construed to extend to causes of action arising within the Northern District of said state.

3 April, 1818, c. 32, s. 6, v. 3, p. 415.

1. (March, 1871.) The sixth section of the act of April 3, 1818 (3 U. S. Stat. at Large, 415), declaring that the original jurisdiction of the Circuit Court of the Southern District of New York shall be confined to causes arising within the said district,

and shall not be construed to extend to causes of action arising within the Northern District of New York, does not exclude from the jurisdiction of the Circuit Court for the Southern District of New York causes of action arising out of the State of New York. *Wheeler v. McCormick*, 8 Blatchf. 267.

**Jurisdiction. Habeas Corpus. See Revised Statutes,
secs. 751, 752, &c.**

1. (April, 1806.) Upon a *habeas corpus*, it can only be inquired whether there is sufficient probable cause to believe that the person charged has committed the offense stated in the warrant of commitment. *United States v. Johns*, 4 Dall. 382.

2. (Dec., 1866.) Circuit Courts, as well as the judges thereof, are authorized by the fourteenth section of the Judiciary Act, to issue the writ of *habeas corpus*, for the purpose of inquiring into the cause of commitment; and they have jurisdiction, except in cases where the privilege of the writ is suspended, to hear and determine the question, whether the party is entitled to be discharged. *Ex parte Milligan*, 4 Wall. 2.

3. The usual course of proceeding is for the court, on the application of the prisoner for a writ of *habeas corpus*, to issue the writ, and, on its return, to hear and dispose of the case; but where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged. *Ib.*

4. Suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself. The writ issues as a matter of course; and, on its return, the court decides whether the applicant is denied the right of proceeding any further. *Ib.*

5. (May, 1812.) The Circuit Court has no authority to issue a *habeas corpus* for the purpose of surrendering in discharge of his bail, where the principal is confined in jail merely under the process of a state court; nor will the court discharge the bail of such party, who have become bound by recognizance in the Circuit Court to answer, &c., merely on account of such impediment; but in their discretion the court will respite the recognizance. *United States v. French*, 1 Gall. 1.

6. (Oct., 1847.) Where no injury or suffering is likely to

happen during a hearing first, on a rule to show cause, the writ of *habeas corpus* will not issue till after such a hearing. *Ex parte Snow*, 3 Woodb. & M. 430.

7. (Oct., 1862.) The service of the writ [of *habeas corpus*] in this case was prevented by force. The writ was ordered to be placed on the files of the court, to be served when and where its service might become practicable. *Matter of Winder*, 2 Cliff. 89.

8. (Sept., 1871.) Under sec. 14 of the Judiciary Act, justices of the Supreme Court and District Courts have power to grant writs of *habeas corpus*, where a person is imprisoned or restrained of his liberty, for the purpose of inquiry into the cause of the commitment; but the writ, in no case, extends to prisoners in jail, unless when they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are to be brought into a court to testify. *Seavey v. Seymour*, 3 Cliff. 439.

9. Under that act a Circuit Court has no authority to re-examine a decision of a District Court. *Ib.*

10. The first section of the act of Feb. 5, 1867, confers upon all the judges and justices of the courts of the United States, in addition to the authority previously conferred, power to grant writs of *habeas corpus*, in all cases where any person may be restrained of his or her liberty, in violation of the Constitution or any law or treaty of the United States, and gives an appeal from the decision of an inferior to the Circuit Court. *Ib.*

11. The first proviso of sec. 20 of the act of Feb. 24, 1864, does not vest the exclusive jurisdiction of applications of this nature in the Secretary of War. [Application for the discharge of a soldier from military service, who is under eighteen years of age, and in the service without consent of parent or guardian.] *Ib.*

12. (April, 1853.) The proceedings on a writ of *habeas corpus*, in the federal courts, are not governed by the laws of the States on the subject, but by the common law of England as it stood at the adoption of the Constitution, subject to such alterations as Congress may see fit to prescribe. *Ex parte Kaine*, 3 Blatchf. 1.

13. Under that system, a decision under one writ, refusing the discharge of a prisoner, is no bar to the issuing of any number of other successive writs, by any court or magistrate having jurisdiction. *Ib.*

14. (April, 1854.) On a *habeas corpus*, sued out by a prisoner who is held under a warrant of commitment, issued by a United States commissioner, ordering him to be detained and given up to the British authorities, as a fugitive from justice from Canada, under the treaty of Washington of Aug. 9, 1842 (8 Stat. at Large, 572, 576), this court cannot review the merits of the decision made by the commissioner, either on the facts or on the law. *Ex parte Van Aernem*, 3 Blatchf. 160.

15. If the commissioner had no jurisdiction of the case, or if there was no legal evidence before him tending to prove the accusation, or if the mandate of the President for the arrest of the prisoner was issued without warrant of law, the court will discharge him. But it will not inquire whether the commissioner erred in deciding that the offense charged was committed by the prisoner, or was an offense within the treaty. *Ib.*

16. The courts of the United States have no authority, on a *habeas corpus*, to inquire into the merits of a decision made by a committing magistrate, and to determine that he erred in his construction of the law or the evidence. It will only inquire whether the prisoner stood charged before the magistrate, with a criminal offense subjecting him to imprisonment, and whether the magistrate possessed competent authority to inquire into and adjudge upon the complaint. *Ib.*

17. (Dec., 1870.) The circuit judge has no jurisdiction to review, on *habeas corpus*, the judgment of the Circuit Court, on a conviction and sentence, on an indictment, on an allegation that the statute under which such sentence was imposed had been repealed before such sentence was passed. *In re Callicot*, 8 Blatchf. 89.

18. Where it appears that the person on whom such sentence was imposed has been pardoned unconditionally, and has had notice of the pardon, and is not restrained of his liberty, a writ of *habeas corpus* will not be granted to him, on such allegation, even though it does not appear that he has accepted the pardon. *Ib.*

19. (Jan., 1871.) Where such officer [of the army of the United States], for not producing the body of the soldier, and for not making a sworn return to the writ, was imprisoned for contempt, by the state court, this court, on a writ of *habeas corpus*, discharged him from imprisonment. *In re Neill*, 8 Blatchf. 156.

20. Such power of discharge exists under sec. 7 of the act of

March 2, 1833 (4 Stat. at Large, 634), and sec. 1 of the act of Feb. 5, 1867 (14 id. 385). *Ib.*

21. (April, 1873.) It is not proper to resort to a *habeas corpus* to review, during the progress of proceedings before the commissioner, decisions on questions as to evidence, made by the commissioner. [In an extradition case.] *In re Macdonnell*, 11 Blatchf. 80.

22. (June, 1873.) A court, or a judge, issuing a writ of *habeas corpus* in an extradition case, does not sit as an appellate tribunal, to review the proceedings which have taken place before a commissioner, as upon allegation of error. *In re Macdonnell*, 11 Blatchf. 171.

23. The adjudications in this court considered as to the power and duty of the court, on *habeas corpus* and *certiorari*, to entertain the question of the sufficiency of the evidence before the commissioner, to warrant the commitment for surrender. *Ib.*

24. (May, 1875.) The provisions of the Revised Statutes of the United States, in regard to the issuing of writs of *habeas corpus* and *certiorari* by the courts and judges of the United States, examined. *In re Stupp*, 12 Blatchf. 501.

25. Where a person is held in custody under a commitment by a commissioner, for surrender under a treaty of extradition, both writs may properly be issued. *Ib.*

26. On the returns to such writs, in such a case, it is not the duty of the court, nor has it the power, to revise the decision of the commissioner on the question of fact as to the criminality of the accused. *Ib.*

27. After a commitment of the accused for surrender, and even after his discharge on *habeas corpus* has been refused, the President may lawfully decline to surrender him, either on the ground that the case is not within the treaty, or that the evidence is not sufficient to establish the charge of criminality; but the statute gives no right of appeal or review on the merits, to be exercised by any court or judicial officer. *Ib.*

28. The court issuing the writ of *habeas corpus* must inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. *Ib.*

29. But the court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion ; nor, if there was legal and competent evidence of facts before the commissioner, for him to consider in making up his decision as to the criminality of the accused, is the court to hold the proceedings illegal, and to discharge the prisoner, because some other evidence was introduced which was not legal or competent, but was held to be so by the commissioner, and was considered by him on the question of fact, or because the court, on a consideration of all the evidence which the commissioner considered, would have come to a different conclusion, or because the court, on an exclusion of such of the evidence as it may think was not legal or competent, would come, on the rest of the evidence, to a different conclusion of fact from that at which the commissioner arrived.¹ *Ib.*

30. (Feb., 1877.) Where an extradition case, under a treaty, is brought before a United States commissioner, it is his judicial duty to judge of the effect of the evidence, and no other judicial officer has any power to review his action thereon. *In re Vandervelpen*, 14 Blatchf. 137.

31. (Jan., 1878.) In a case of extradition, before a United States commissioner, where he has before him legal and competent evidence relating to the charge against the accused, it is his judicial duty to judge of the effect of such evidence ; and neither the duty nor the power to review his action thereon has been conferred on any other judicial officer. *In re Wiegand*, 14 Blatchf. 370.

32. (Nov., 1878.) Where a commissioner has jurisdiction of extradition proceedings, and has before him legal and competent evidence, as to the criminality of the accused, he is made the judge of the weight and effect of the evidence, and this court has no power to review his action. *In re Wahl*, 15 Blatchf. 334.

33. (April, 1805.) The courts of the United States and the justices thereof are only authorized to issue writs of *habeas corpus* to prisoners in jail, under or by color of the authority of the United States, or committed by some court of the United States, or required to testify in a cause depending in a court of the United States. *Ex parte Cabrera*, 1 Wash. 232.

34. The Circuit Court cannot quash proceedings against a pub-

¹ As to documentary evidence from abroad, in extradition cases, see the subsequent notes of the syllabus in this case.

lic minister, depending in a state court; nor can the court in any way interfere with the jurisdiction of the courts of a state. *Ib.*

35. (April, 1881.) The defendant was brought before the court on a *habeas corpus*, to which the marshal returned that he arrested the defendant under the authority of a warrant of attachment issued from the Circuit Court of Rhode Island, directed to him. The District or Circuit Court of one district has no authority to issue its process into any other district, to compel the appearance of a person not residing or found within the jurisdiction of the court from which the process issued, or for any alleged contempt of the court. *Ex parte Graham*, 4 Wash. 211.

36. (Oct., 1853.) The court may issue a *habeas corpus* to bring before it one of its deputy marshals arrested and put in jail under state process, whether of a justice of the peace or of the court, or Supreme Court, — whether criminal or civil, — for his conduct in executing a writ, &c.; may inquire into the cause of commitment, and, if illegal, order a complete discharge. And in the case of an arrest on state process of an officer of the United States, for an alleged abuse of his powers, this court will not only hear evidence to disprove the truth of the affidavits upon which the state authorities proceeded, but will, independently of such proof, consider those affidavits; and if, in the judgment of this court, those affidavits do not contain a *prima facie* ground for arrest, will discharge the federal officer, without hearing any counter evidence. As a general thing, moreover, in the case of such an officer, the court will discharge him, unless there be a positive oath of merits from the plaintiff, or a sworn detail of circumstances from others, to supply its place. *Ex parte Jenkins*, 2 Wall. Jr. 521.

37. If an officer of the United States has been arrested to answer an indictment found by a state court, for riot, assault and battery, and assault with attempt to kill, the indictment not showing that the alleged offenses were committed while the officer was professing to act under a law of the United States, or under some order, process, or decree of some judge or court thereof, this court, on a *habeas corpus*, where the petition of the officer denies the offense, and avers that what is alleged as offense was done in proper execution of an order, process, or decree of a federal court, will go outside the indictment, and hear evidence to show the truth of the facts set forth by the officer. *Ib.*

38. On a *habeas corpus*, in a question of conflict between state and federal process, counsel have no right to appear in defense of the state process, unless in some way authorized by the state or its proper officers; and, after return made, the court refused to hear as counsel a member of the bar who showed no such authority, nor any authority beyond that of the person executing the state writ. *Ib.*

39. (Nov., 1833.) The act of Congress authorizing the writ of *habeas corpus* to be issued, "for the purpose of inquiring into the cause of commitment," applies as well to cases of commitment under civil as to those under criminal process. *Ex parte Randolph*, 2 Brock. 448.

40. (May, 1869.) A person convicted by a jury, and sentenced in court by a judge *de facto*, acting under color of office, though not *de jure*, and detained in custody in pursuance of his sentence, cannot be properly discharged upon *habeas corpus*. *Cæsar Griffin's Case*, Chase, 364.

41. The court was presided over by a judge disqualified to hold office by the Fourteenth Amendment to the Constitution of the United States; but he had been in office two years before the amendment was adopted. G. applied to the United States Circuit Court for Virginia, to be discharged on *habeas corpus*. *Held*, he cannot be discharged. *Ib.*

42. (Oct., 1874.) The Virginia act of assembly, sec. 22 of ch. 214, acts of 1874, prohibiting persons other than citizens of Virginia from taking or planting oysters in the waters of the commonwealth, and subjecting offenders to forfeiture and indictment, fastens the disability of alienage upon non-residents, and places them on a different footing from residents, in respect to the privileges denied, and is therefore unconstitutional. *Ex parte McCready*, 1 Hughes, 598.

43. A person indicted and imprisoned under this act of assembly is deprived of his liberty in violation of the Constitution of the United States, and therefore, if in prison under state prosecution, may be released on *habeas corpus* by a judge of a court of the United States, under the act of Congress of Feb. 5, 1867, sec. 753, Revised Statutes of the United States. *Ib.*

44. (Feb., 1875.) Where a prisoner who is a non-resident of a state is under arrest for an act which would subject a resident to prosecution, committed in violation of a law which, in some

of its provisions in regard to non-residents, is in violation of the Constitution of the United States, he is not entitled to be released by a judge of a federal court on *habeas corpus*. *Ex parte Touchman*, 1 Hughes, 601.

45. (Nov., 1876.) It is competent for a federal court to issue the writ of *habeas corpus*, in favor of petitioners imprisoned for contempt by a state court, where the acts of alleged contempt were committed in the performance of duties created by the Constitution and laws of the United States, and the petitioners were acting under the protection of the laws and the courts of the United States. *Electoral College of South Carolina*, 1 Hughes, 571.

46. Where it clearly appears from the record that the state court exceeded its powers in committing such petitioners, it is competent for a federal court to release and discharge them from imprisonment. *Id.*

47. (Jan., 1877.) An arrest by the state authorities of a person accused of a crime committed in one of the places mentioned in sec. 711 of the Revised Statutes of the United States, is a violation of a law of the United States, in contemplation of sec. 753; that is to say, is a violation of sec. 711; and a United States court may issue the writ of *habeas corpus* for a person so arrested by state authorities, and in jail under such arrest. *Ex parte Tatem*, 1 Hughes, 588.

48. (April, 1878.) Where a citizen charged with an offense in another state has been committed for trial by the magistrate of a state, it is competent for a court of the United States, on a writ of *habeas corpus*, to inquire into the validity of the *mittimus*, and to discharge the prisoner, unless, —

(1.) There is a charge of crime against the prisoner in the state from which he is alleged to be a fugitive;

(2.) There be a demand by the governor of that state for his arrest and detention;

(3.) There be an indictment found in the state from which the prisoner has fled, or an affidavit made and certified by the governor of that state; and,

(4.) The prisoner should have been in the state where the crime was committed, and have fled from it. *Ex parte McKean*, 3 Hughes, 23.

49. (Nov., 1878.) A writ of *habeas corpus* was granted by a Circuit Court of the United States, commanding the sheriff of a

county to bring the bodies of two colored persons before the said court, with a statement of the cause of their detention, the court proceeding on the allegation of the petition of the prisoners, that being colored persons they had been tried capitally before a state court, by a jury exclusively white, in contravention of sec. 641 of the Revised Statutes of the United States. *Ex parte Reynolds*, 3 Hughes, 559.

50. (May, 1879.) A prisoner who has been prosecuted and imprisoned by his state, for violating a law of his state relating to marriage, cannot be released by a United States court, on *habeas corpus*, on the ground that such law violates the Constitution or a law of the United States. *Ex parte Kinney*, 3 Hughes, 9.

51. (May, 1875.) As a general rule of the common law, when it appears by the return to a writ of *habeas corpus*, that the prisoner is confined upon a regular charge and commitment for a criminal offense, and especially if he be confined in execution after conviction, he will be at once returned to custody. *Ex parte Dock Bridges*, 2 Woods, 428.

52. But this rule has been modified by several acts of Congress, which are condensed into sec. 753, Rev. Stat., whereby the courts of the United States are authorized to issue the writ in behalf of any person restrained of his or her liberty in violation of the Constitution or of any treaty or law of the United States. *Ib.*

53. Therefore, a person who had been convicted in a state court, for the offense of perjury committed in the course of a judicial investigation conducted under authority of acts of Congress, and was undergoing imprisonment in the penitentiary therefor, was discharged on *habeas corpus* issued from a court of the United States. *Ib.*

54. (Feb., 1879.) When a person is in custody for an act done or omitted, in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, he is entitled to be discharged on *habeas corpus*, no matter by what authority he is restrained of his liberty, nor how regular and formal the proceedings against him may be. *Ex parte Turner*, 3 Woods, 603.

55. The fact that he is in custody by virtue of the judgment of a state court, for contempt, forms no exception to this rule. *Ib.*

56. The court which first obtains, by its process, possession of

papers and documents which are proper evidence in a prosecution pending in such court, has the right to retain them until they have been used in evidence, and no other court of concurrent jurisdiction can, without its leave, take them from its custody, or require its officers to produce them before its grand jury. *Ib.*

57. Officers of a court of the United States, who are arrested by a state court for contempt, in refusing to obey such a requirement, are entitled to be discharged on *habeas corpus*. *Ib.*

58. (April, 1856.) Sec. 7 of the act of Congress of March 2, 1833, authorizes any judge of the United States to issue the writ of *habeas corpus* where an officer of the United States is imprisoned "for any act done, or omitted to be done, in pursuance of a law of the United States." *Ex parte Robinson*, 1 Bond, 39.

59. It is the proper remedy where a marshal is imprisoned by the sentence of a state judge, as for a contempt in not producing the bodies of certain persons named in a writ of *habeas corpus* issued by such judge; and if it appears from the evidence that such persons were legally in the custody of the marshal, pursuant to the provisions of the Fugitive Slave Act, and that his refusal to produce them before the state judge was a paramount duty by the terms of the said act, the marshal is entitled to his discharge under said sec. 7 of the act of 1833. *Ib.*

60. In ordering his discharge upon a *habeas corpus*, a judge of the United States does not assume a jurisdiction to review or reverse the sentence or judgment of the state judge, but merely exercises a power expressly conferred by an act of Congress. *Ib.*

61. Although the authorities are not uniform as to the right of a state judge to issue the writ of *habeas corpus*, where the imprisonment is under the authority of a law of the United States, it is well settled that, when the fact is proved that the imprisonment is under such authority, the jurisdiction of the state judge is at an end, and all subsequent proceedings are *coram non judice*. *Ib.*

62. (Oct., 1858.) The first clause of sec. 14 of the Judiciary Act of 1789, which provides that the Supreme Court, Circuit and District Courts of the United States "shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," does not authorize said courts to

issue a *habeas corpus*, unless it is necessary in aid of jurisdiction in a case or proceeding there pending. *Ex parte Everts*, 1 Bond, 197.

63. The case of a father claiming the custody of an infant child is not one in which a *habeas corpus* can issue by a court of the United States, as ancillary to the exercise of its jurisdiction, under the above-cited clause of the act of 1789. *Ib.*

64. Nor can a Circuit Court of the United States take jurisdiction under sec. 11 of the act of 1789, although the father is a citizen of another state, as the matter in dispute has no pecuniary value, and cannot be estimated in money. *Ib.*

65. (Feb., 1876.) Under the writ of *habeas corpus*, the courts of the United States have power to discharge persons while under arrest by state officers, if it appears that they are held in custody under a state law which attempts to punish them for executing a law of the United States, or where the act for which they are held was done under process of a federal court. *Ex parte Thompson*, 1 Flipp. 507.

66. If, however, a party be in the custody of an officer of the state government under an indictment for larceny, and as a justification for the act complained of sets up the fact of the issue of a writ of replevin from the United States court, the last-named court, on *habeas corpus*, will inquire into the facts; and if it should appear that the writ was obtained fraudulently, with the purpose of carrying off property, the court will remand the relator to the custody of the state officers. *Ib.*

67. (Oct., 1842.) On a *habeas corpus* the court cannot look behind the sentence of the court, where it had jurisdiction. *Johnson v. United States*, 3 McLean, 89.

68. (Dec., 1842.) A *habeas corpus* may issue, by the courts of the United States, to bring up a person charged with being a fugitive from justice. *Ex parte Smith*, 3 McLean, 121.

69. (Dec., 1843.) On a *habeas corpus*, the court will inquire whether the *capias* was rightfully issued. And this involves the sufficiency of the affidavit. *Nelson v. Cutter*, 3 McLean, 326.

70. (Oct., 1850.) Where a person is in custody under the state authority, this court has no authority to bring him before it by a *habeas corpus*. *United States v. Rector*, 5 McLean, 174.

71. (April, 1855.) A writ of *habeas corpus* may issue to relieve an officer of the federal government, who has been impris-

oned under state authority, for the performance of his duty. *Ex parte Robinson*, 6 McLean, 355.

72. (March, 1871.) The fact that the prisoner is retained for a time, either before or after sentence, in the county jail, does not, in either case, authorize a writ of *habeas corpus*. *Ex parte Geary*, 2 Biss. 485.

73. (1871.) The validity of the enlistment of a person into the military service of the United States may be inquired into on *habeas corpus* by a United States judge. *Ex parte Schmeid*, 1 Dill. 587.

74. (1875.) The petitioner was indicted in the District of Columbia for the offense of criminal libel, and was discharged on *habeas corpus* in the Eastern District of Missouri from commitment under a commissioner's warrant issued in the last-named district,—the ground of the discharge being, that the indictment failed to allege a *publication* of the libel in the District of Columbia. *In re Buell*, 3 Dill. 116.

75. (1876.) Under the extradition treaty of the United States with Belgium (Treaties, 1873-74, p. 120), it is no ground of discharge of the alleged fugitive on *habeas corpus* that the warrant of arrest was issued by the proper judicial officer instead of by the president. *Ex parte Van Hoven*, 4 Dill. 415.

76. It need not appear by distinct recital in the mandate of the Secretary of State to the judicial officers of the government that a warrant for the arrest of the alleged fugitive, for the crime imputed to him, ever issued in Belgium. The judicial department will presume from the mandate of the Secretary of State that this was done. *Ib.*

77. A complaint under oath, made by the Consul-General of Belgium, before a proper commissioner in the Southern District of New York, upon the strength of telegrams and depositions taken in Belgium, held sufficient to justify the court in remanding the prisoner for examination by the commissioner before whom the complaint was made and who issued the warrant of arrest. *Ib.*

78. (1877.) An erroneous decision of a court having jurisdiction of the offense and of the person indicted cannot be re-examined on *habeas corpus*. *Ex parte Shaffenburg*, 4 Dill. 271.

79. (1877.) A person indicted in a state court, for an act done in pursuance of a law of the United States, may be discharged from custody under such indictment, on a writ of *habeas corpus*

issued by a federal court or judge, under sec. 753 of the Revised Statutes of the United States. *In re Bull & Turtle*, 4 Dill. 323.

80. (1878.) By the laws of the United States, the Supreme, Circuit, and District Courts, or the judges thereof, have power to grant the writ of *habeas corpus* within their respective jurisdictions. *Ex parte Kenyon*, 5 Dill. 385.

81. The Indian country is within the jurisdiction of the Western District of Arkansas. A writ of *habeas corpus* issued by the United States court of that district, or the judge thereof, will run in that territory. *Ib.*

82. If a person is held in custody in violation of the Constitution, laws, or treaties of the United States, — it matters not by whom he is held, — the courts of the United States, within their respective territorial jurisdictions, have power to issue the writ of *habeas corpus* to inquire into the cause of his imprisonment. *Ib.*

83. If a person is held in custody by virtue of the judgment of a court of another jurisdiction, and in violation of the Constitution, laws, or treaties of the United States, a federal court will interfere by *habeas corpus* and examine the case so far as may be necessary to ascertain that fact. *Ib.*

84. An Indian is a *person* within the meaning of the *habeas corpus* act, and as such is entitled to sue out a writ of *habeas corpus* in the federal court, when it is shown that the petitioner is deprived of liberty under color of authority of the United States, or is in custody of an officer in violation of the Constitution or a law of the United States, or in violation of a treaty made in pursuance thereof. *Ib.*

85. (July, 1856.) The Circuit Courts and federal judges have the power to apply the writ of *habeas corpus* to all cases which it would reach at common law, provided it is not issued to any person in jail, unless confined under or by color of the authority of the United States. *Ex parte Des Rochers*, McAll. 68.

86. (Feb., 1864.) The Circuit Court has jurisdiction to inquire [on *habeas corpus*] into the legality of the imprisonment of a person held under its own sentence. *In re Greathouse*, 4 Sawyer, 487.

87. (April, 1873.) When it appears on the return to a writ of *habeas corpus* that the petitioner is held for trial by a naval court-martial, for offenses charged to have been committed while in the naval service, the only questions to be determined are, whether the said naval court has jurisdiction to try the petitioner for the

offenses charged; and is it proceeding regularly in the exercise of that jurisdiction. *In re Bogart*, 2 Sawyer, 396.

88. (Feb., 1880.) Where an alien prisoner held in custody, in execution of a judgment rendered by a state court convicting him of an offense created by a state statute, alleges in his petition that the statute under which he is convicted was passed in violation of the Constitution of the United States, and of the provisions of a treaty of the United States with the nation of which he is a subject, the Circuit Court has jurisdiction on a writ of *habeas corpus* to inquire into the validity of the statute and judgment, and, if found to be in violation of such Constitution and treaty, is authorized to discharge the petitioner from such custody. *In re Wong Yung Quy*, 6 Sawyer, 237.

Parties. In Actions at Law.

1. (Aug., 1792.) Whether a state can be admitted to defend or assert a claim in the Circuit Court in a suit depending between two individuals, *quære*. *Georgia v. Brailsford*, 2 Dall. 402, 415.

2. (Feb., 1814.) Under the act of Kentucky, to amend process in chancery and common law, the party may recover, although he prove only part of the claim in his declaration; but it does not enable him to join parties in an action, who could not be joined at the common law. *Green v. Liter*, 8 Cranch, 230.

3. (Jan., 1840.) To a *scire facias* to revive a judgment in ejectment, it is not necessary to make the executors or administrators of deceased defendants parties; the subject-matter in dispute being land, over which they have no control. The law is well settled, that where a defendant in ejectment dies, the judgment must be revived against both his heirs and the tenants. *Walden v. Craig*, 14 Pet. 147.

4. (Jan., 1848.) The practice in Louisiana allows the sureties to be sued without joining the principal. *United States v. Hodge*, 6 How. 279.

5. (Jan., 1850.) There was no necessity for making the auctioneer a defendant in the suit. *Veazie v. Williams*, 8 How. 134.

6. (Dec., 1851.) Where the covenant purported to be made between two persons by name, of the first part, and the corporate company, of the second part, and only one of the persons of the first part signed the instrument, and the covenant ran

between the party of the first part and the party of the second part, it was proper for the person who had signed on the first part to sue alone ; because the covenant inured to the benefit of those who were parties to it. *Philadelphia, Wilmington, & Baltimore Railroad Co. v. Howard*, 13 How. 308.

7. (Dec., 1857.) The laws of California require that actions shall be prosecuted in the name of the real party in interest, and that all parties having an interest in the subject of the action may be joined. So that this statute is complied with, it is not a fatal objection that the respective interests of parties *jointly* concerned are not accurately set forth. *Lyon v. Bertram*, 20 How. 150.

8. (Dec., 1858.) Where a contract is made by an agent, the principal whom he represents may maintain an action upon it in his own name, although the name of the principal was not disclosed at the time of making the contract ; and, although the contract be in writing, parol evidence is admissible to show that the agent was acting for his principal. *Ford v. Williams*, 21 How. 287.

9. (Dec., 1858.) Where four persons made a contract with a citizen of Ohio, and three of the four were citizens of Indiana, and suit was brought against the three in the Circuit Court of the United States for Indiana, the non-joinder of the fourth was justified by the act of 1839 (5 Stat. at L. 321). *Clearwater v. Meredith*, 21 How. 489.

10. (Dec., 1861.) Where a contract is joint, and not several, all the obligees who are alive must be joined as plaintiffs. *Farni v. Tesson*, 1 Black, 309.

11. If one of the joint obligees be dead, a suggestion of that fact is sufficient to show a right to sue in the names of the survivors. *Ib.*

12. If by the condition of a bond the money to be recovered be not for the joint benefit of all the obligees, the suggestion of that fact cannot alter the obligation ; but all the parties having a legal title to recover must join in the suit ; and the judgment will be for the use of the party named in the condition and equitably entitled to the money. *Ib.*

13. Where some of the obligees of a bond, who should be joined as plaintiffs, in a suit brought upon it, are omitted, in order to give jurisdiction in the case to a federal court, such a reason, even if alleged in the pleading, would not cure the omission. *Ib.*

14. (Dec., 1869.) Where an instrument provides for the set-

tlement of certain claims between certain parties, and the submission of other claims between other parties, the latter parties should only be named in actions upon the covenant of submission, although the instrument be signed by all the parties named therein. *Smith v. Morse*, 9 Wall. 77.

15. (Oct., 1878.) Without such an act [giving consent to sue the United States], no direct proceedings will lie at the suit of an individual, against the United States or its property; and its officer cannot waive its privilege in this respect, or lawfully consent that such a suit may be prosecuted so as to bind it. *Carr v. United States*, 8 Otto, 433.

16. (May, 1836.) In cases of tort the plaintiff may elect to make his action joint, or several; and no defendant can take away this election. *Smith v. Rines*, 2 Sumn. 339.

17. A severance of a suit, so as to make two several suits out of one joint suit, is not allowed at the common law, as to parties defendant. *Ib.*

18. (April, 1810.) No action will lie in the name of a principal, on a written contract made by his agent in his own name, although the defendant may have known the agent's character; and a demurrer, in such a case, to the declaration, where the United States were the plaintiffs, was sustained. *United States v. Parmele*, 1 Paine, 252.

19. (June, 1828.) Jurisdiction of the court is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record; and in all cases where jurisdiction depends on the party, it is the party named in the record. *Gill v. Stebbins*, 1 Paine, 417.

20. (May, 1849.) An action pending in this court does not abate by the death of the plaintiff before judgment; but his personal representatives may, under sec. 31 of the Judiciary Act of 1789 (1 Stat. at Large, 90), become a party to the suit, and prosecute it to final judgment, in case the cause of action survives to him by the local law. *Hatfield v. Bushnell*, 1 Blatchf. 393.

21. (Dec., 1854.) Where goods are entered at the custom-house, and are then deposited in a bonded warehouse, the collector, although having the custody of the goods, is not a proper party to a suit between rival claimants to the ownership of the goods, where it is not alleged that the collector is acting wrongfully, and without authority of law. *Rateau v. Bernard*, 3 Blatchf. 245.

22. (Aug., 1860.) Where an action at law for the infringement of letters-patent is brought in the name of the holder of the legal title to the patent, but for the benefit of a party who is an exclusive licensee, under the patent, of the right to make a particular article, the suit will not be discontinued on the application of the defendant and the consent of the nominal plaintiff. *Good-year v. Bishop*, 4 Blatchf. 438.

23. The nominal plaintiff may claim indemnity against costs; and the court, on a proper application, will provide for it. *Ib.*

24. (April, 1868.) A person who has no interest, in a legal sense, in the subject-matter of a suit *in personam*, and who is not a party to it, cannot compel the plaintiff to make him a party. *Coleman v. Martin*, 6 Blatchf. 119.

25. (Oct., 1811.) Although one partner is not bound singly to pay a debt due from him and his partner, if, when sued, he plead in abatement the omission to join his partner in the action, yet he is not entitled to recover in his own name a partnership debt; and if he sue in his own name, the defendant may take advantage of it on the trial on the general issue. *Jordan v. Wilkins*, 3 Wash. 110.

26. (April, 1822.) The Circuit Courts have not jurisdiction of suits brought by a state, against a citizen of the same or of another state. *Den v. Babcock*, 4 Wash. 199.

27. (April, 1862.) A county may be sued in the United States courts. *McCoy v. Washington County*, 3 Wall. Jr. 381.

28. (May, 1813.) In an action on a joint and several bond, against several defendants, some of whom are non-residents of the state in which the suit is brought, and there is a return of "no inhabitants" as to them, the plaintiff may proceed to take judgment against those on whom process has been served. *Pegram v. United States*, 1 Brock. 261.

29. If, in such a case, the plaintiff declares against all the co-obligors, and those on whom process has been served proceed to trial on the merits, the averment that all the co-obligors are in custody, though irregular, is not fatal, and will not preclude the plaintiff from obtaining judgment against such of the co-obligors as are really before the court. *Ib.*

30. (Jan., 1878.) The United States government cannot be sued.¹ *United States v. Barney*, 3 Hughes, 545.

¹ Except where provision is made by statute, as in the Court of Claims.

31. (April, 1866.) Suits for the recovery of the penalty prescribed by sec. 5 of the act of Aug. 29, 1842, for affixing the word "patent" to unpatented articles must be brought in the name of the informer, and not in the name of the United States. *United States v. Morris*, 2 Bond, 23.

32. (March, 1872.) One who claims to be the president of a gas company, and at the same time a stockholder and creditor, cannot sue in his own name for injuries done to him or to the gas company. The suit must, if brought, be in the name of the company or corporation. *Donovan v. Dean*, 1 Flipp. 182.

33. (June, 1840.) Where a note is given to A. B., C. D., or G. H., either of the promisees may bring the action in his own name. The promise to pay is to either of the promisees, in the alternative. *Spaulding v. Evans*, 2 McLean, 139.

34. (Dec., 1844.) The court will not dismiss an action of ejectment when the lessor of the plaintiff is living, though he may be insane. *Lessee of Gilleland v. Martin*, 3 McLean, 490.

35. If the lessor be a lunatic, the action is well brought in his name. *Ib.*

36. (Jan., 1864.) Under the act of Congress of April 10, 1806, providing for suits on marshals' bonds, it is optional with the injured party to bring the suit on the bond in his own name, or in the name of the United States; and the United States is not substantially a party to the record. *United States, ex rel. De Loyne, v. Davidson*, 1 Biss. 433.

37. (1871.) This was an action at law brought in this court in the name of George W. Perkins, the warden of the Illinois State Penitentiary, as warden (disclosing his capacity), for goods sold by him as warden, which were manufactured at the penitentiary (a public institution belonging to the state, and governed and regulated by a public act of the legislature, but which is silent as to the name in which actions shall be brought for property sold); and the answer was simply a *general denial* of the allegations of the petition.

We hold, under the Civil Code of Kansas (construing secs. 10, 28, 89, and 91 thereof), adopted as the practice of this court in actions at law, that the defendant cannot on the trial, after the evidence is closed, for the first time object (in the state of the pleadings) to a recovery, on the ground that the plaintiff was not the real party in interest, and had no capacity or right to

sue, but that the action should have been brought in the name of the State of Illinois, as the party really concerned. *Perkins v. Ingersoll*, 1 Dill. 417.

38. (1872.) A state cannot maintain, as plaintiff, an action in the Circuit Court of the United States. *Wisconsin v. Duluth*, 2 Dill. 406.

39. (May, 1847.) On an administration bond, payable to the governor by name, and to his successors in office, the suit for the benefit of the party injured must be brought in the name of the governor for the time being, and not by his style of office. *Governor of Arkansas v. Ball*, Hempst. 541.

40. Although he is a purely naked trustee for any party injured, yet the legal title is in him, and he must sue. *Ib.*

41. A suit by the style of office, namely, "The Governor of the State of Arkansas, plaintiff," cannot be maintained. *Ib.*

Parties. Executors or Administrators.

1. (Jan., 1829.) By the law of Mississippi, the assignee of a chose in action may institute a suit in his own name. When, therefore, an executor, having proved the will of his testator, in Kentucky, had assigned a promissory note due to the estate by a citizen of Mississippi, the suit was well brought by the assignee, without any probate of the will in that state. *Harper v. Butler*, 2 Pet. 239.

2. (Jan., 1848.) An action on the case will not lie against the executors of a deceased marshal, where executions had been placed in the hands of the marshal, and false returns made on some of them, and imperfect and insufficient entries on others. *United States v. Daniel*, 6 How. 11.

3. The rule respecting abatement is this: If the person charged has received no benefit to himself, at the expense of the sufferer, the cause of action does not survive. But where, by means of the offense, property is acquired which benefits the testator, there an action for the value of the property survives against the executor. *Ib.*

4. (Jan., 1848.) An action of debt will not lie against an administrator, in one of these United States, on a judgment obtained against a different administrator of the same intestate, appointed under the authority of another state. *Stacy v. Thrasher*, 6 How. 44.

5. (Dec., 1869.) The federal courts, where they have jurisdiction, will enforce, for the furtherance of justice, the same rules in the adjustment of claims against ancillary executors that the local courts would do in favor of their own citizens. *Walker v. Walker*, 9 Wall. 744.

6. (Oct., 1824.) Where the plaintiff joined counts on a bill of exchange as indorsee, with counts on bills of exchange "as beneficiary heir and administrator of the estate of J. C. P., deceased," by the law of France, and thereby proprietor of the bills, it was held that the latter counts were in his representative character, and there was a misjoinder. *Picquet v. Swan*, 3 Mason, 469.

7. In such a case, the plaintiff cannot sue on the bills of the intestate, in the Circuit Court, without taking out letters of administration in Massachusetts. *Ib.*

8. (Oct., 1825.) Although no suit can be maintained in our courts by a foreign executor and administrator, unless he has taken out administration here, yet this principle does not apply, except where the party sues in right of the deceased. *Trecothick v. Austin*, 4 Mason, 16.

9. If he sues in his own right, although the right be derived under a foreign will, no administration need be taken out here, if it does not affect real estate passed by the will here. *Ib.*

10. (Oct., 1858.) An executor or administrator, deriving his authority solely from one state, cannot sue or be sued in his official character in another state, for assets lawfully received by him in the jurisdiction where he was appointed. *Mellus v. Thompson*, 1 Cliff. 125.

11. (Oct., 1867.) An action at law will not lie in this court against an administrator appointed by a probate court in Massachusetts, but who has never taken out letters of administration in New York, to recover a debt due from the deceased to the plaintiff. *Caldwell v. Harding*, 5 Blatchf. 501.

12. (June, 1874.) The probate of a will and issue of letters testamentary in the State of New York do not authorize the executors to maintain actions for the collection of assets of the estate of the deceased in the State of California. *Bartlett v. Rogers*, 3 Sawyer, 62.

13. The objection may be taken at the hearing, where it does not appear on the face of the complaint *where* letters are issued, and issue has been joined on the allegation of the complaint,

that letters testamentary have been duly issued to the plaintiffs. *Ib.*

Parties. Corporations.

1. (June, 1850.) A corporation may sue in a state other than that which granted the charter, by comity. *New York Dry Dock v. Hicks*, 5 McLean, 111.

2. (March, 1869.) A corporation which has a legal existence in any one state can sue in the federal courts of any other state. It is not necessary that it be a corporation created by the laws of that state. *National Park Bank v. Nichols*, 4 Biss. 315.

PLEADINGS IN ACTIONS AT COMMON LAW.

Pleadings. Generally.

1. (Jan., 1831.) Insufficient and defective pleading. *Livingston v. Smith*, 5 Pet. 90.

2. (Dec., 1859.) The evils commented upon, arising from the courts of the United States permitting the hybrid system of pleading from the state codes to be introduced on their records. *Green v. Custard*, 23 How. 484.

3. (Oct., 1873.) A superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to have jurisdiction to give the judgments it renders until the contrary appears; and this presumption embraces jurisdiction not only of the cause or subject-matter of the action in which the judgment is given, but of the parties also. The rule is different with respect to courts of special and limited authority, — *their* jurisdiction must affirmatively appear by sufficient evidence or proper averment in the record, or their judgments will be deemed void on their face. *Galpin v. Page*, 18 Wall. 350.

4. The presumption which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. When the record states the evidence, or makes an averment with reference to a jurisdictional fact, it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. *Ib.*

5. The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, and over proceedings which are in accordance with the course of the common law. *Ib.*

6. Where special powers conferred upon a court of general jurisdiction are brought into action according to the course of the common law, that is, in the usual form of common-law and chancery proceedings, by regular process and personal service, where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court, as in cases falling within the general powers. But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record. *Ib.*

7. (Oct., 1876.) There are no presumptions in favor of the jurisdiction of the courts of the United States; but the facts upon which it rests must, in some form, appear in the record of all suits prosecuted before them. *Ex parte Smith*, 4 Otto, 455.

8. (Oct., 1880.) A statute was declared to be a public act. A subsequent statute, supplementary thereto and amendatory thereof, is also a public act, and need not be specially pleaded. *Unity v. Burrage*, 13 Otto, 447.

9. (Oct., 1880.) A pleading which would be cured by verdict is good after a finding by the court to which the trial of the issue was submitted by the stipulation of the parties. *Adam v. Norris*, 13 Otto, 591.

10. (Oct., 1819.) Rules of pleading in courts of common law, how far applicable to courts proceeding according to the civil law. *Crawford v. The William Penn*, 3 Wash. 434.

11. (April, 1873.) When want of jurisdiction appears upon the face of the pleadings, the objection should be taken by demurrer; when it does not so appear, by plea. *Varner v. West*, 1 Woods, 493.

12. (May, 1878.) Under the jurisprudence of Texas, the

party making a charge of fraud must point out, at least in general terms, the acts upon which he relies to sustain it. *Hitchcock v. City of Galveston*, 3 Woods, 287.

13. (Feb., 1866.) A plaintiff or defendant is not bound, in his declaration or plea, to anticipate, notice, and remove every possible exception, answer, or objection which may exist, and with which his adversary may intend to oppose him. He sufficiently substantiates the charge or answer, for the purpose of pleading, if his pleading establishes a *prima facie* charge or answer. *Hammer v. Kauffman*, 2 Bond, 1.

14. It is not necessary to state matter which should come from the other side. Matter in defeasance of an action need not be stated, and whenever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, *prima facie* well founded, whether called by the name of a proviso or a condition subsequent, it must, in its nature, be matter of defense, and ought to be shown in pleading by the opposite party. *Ib.*

15. (July, 1843.) In pleading, it is not necessary to state what is merely matter of evidence. *Hobson v. McArthur's Heirs*, 3 McLean, 241.

16. (May, 1849.) It is unnecessary in a declaration or plea to set out the law of any state, as the courts of the United States take notice of such laws without pleading or proof. *Jones & Hardy v. Hays*, 4 McLean, 521.

17. (April, 1851.) If counts be abandoned, they are not for all purposes considered as stricken from the record. As matters of reference in subsequent counts, they are held good. *Jones v. Vanzandt*, 5 McLean, 214.

18. (Oct., 1854.) Allegations in pleading are admissions by the pleader, and need no proof, unless denied and put in issue; and as against the pleader will always be taken as matter conceded. *Brig Fashion v. Wards*, 6 McLean, 152.

19. (March, 1880.) (1.) In pleading, the parties respectively must aver the issuable facts, and nothing more. (2.) If a pleading has not sufficient issuable facts to constitute a cause of action or defense, or is mixed with statements as to evidence to support the same, the opposite party may demur. (3.) If a pleading is so vague and confused that the material and immaterial allegations are intermixed, or a mass of statements is contained therein, some issuable and others non-issuable, the opposite party may

move to make the pleading more definite and certain. (4.) But motions to strike out special clauses and sentences in a pleading will not be entertained. *Gause v. Knapp*, 1 McCrary, 75.

20. (June, 1880.) An averment in a pleading, that a corporation had power to execute a contract, must be taken to mean that it had such power by virtue of the law of its being. *Telegraph Co. v. Railway Co.*, 1 McCrary, 418.

21. (Nov., 1872.) In actions at law, a writing complained upon or pleaded must be set forth in the pleading according to its tenor or legal effect, and if it is merely referred to and annexed as an exhibit, it will be stricken out, on motion, as impertinent and irrelevant. *Oh Chow v. Hallett*, 2 Sawyer, 259.

Declarations. Generally.

1. (Feb., 1812.) A plaintiff who has declared jointly against two defendants, as being in custody, when in fact only one of the defendants was taken on the *capias*, cannot abate his own action against the party not taken, unless authorized so to do by the return of the process against that party. *Barton v. Petit*, 7 Cranch, 194.

2. The plaintiff in Virginia is not bound to declare, until all the defendants have appeared, or the suit be abated as to such as have not appeared. *Ib.*

3. (Feb., 1825.) A defective declaration may be aided by the plea, and a defective plea by the replication. *United States v. Morris*, 10 Wheat. 286.

4. (Jan., 1846.) Where a count in a declaration is defective on account of dates being left blank, but the party has pleaded and gone to trial, the presumption is that the proof supplied the defect. *Stockton v. Bishop*, 4 How. 155.

5. (Oct., 1874.) The statute of Illinois, which, in trials or actions by or against partners, on contracts, dispenses, in the first instance, with the necessity of proof of the partnership, applies to a case where the declaration begins thus: "A., B., and C., trading as A. & Co., complain of D., E., and F., trading as D. & Co.," then goes on referring, throughout, to the parties respectively, as "the said plaintiffs" and "the said defendants." The designation of the parties, as partners, in the opening of the declaration is not a simple *designatio personarum* and surplusage, but

amounts to an averment that they contracted as partners. *Cooper & Co. v. Coates & Co.*, 21 Wall. 105.

6. (Oct., 1878.) In Illinois, a copy of the written instrument on which the action is founded must be filed with the declaration, and it constitutes part of the pleadings in the case. *Nauvoo v. Ritter*, 7 Otto, 389.

7. (April, 1870.) Whenever the same plea may be pleaded, and the same judgment given on two counts, they may be joined in the same declaration. *Stockwell v. United States*, 3 Cliff. 284.

8. The liability for receiving, concealing, or buying [goods without payment of lawful import duties] is founded upon a distinct act from that of illegally importing. An agent or consignee may be liable for both; and the two counts may be joined. *Ib.*

9. (Nov., 1867.) The jurisdiction of this court must appear affirmatively by the record, and the want of jurisdiction need not be pleaded. *Kelly v. Harding*, 5 Blatchf. 502.

10. (Oct., 1808.) Courts of limited jurisdiction must act within the scope of their authority; and it must appear, on the face of the proceedings, that they did so exercise their authority, or all they do will be *coram non judice* and void. The legislature which creates such courts may alter or qualify this principle, and when this is done, the law creating the exception is alone to be regarded. *Kemp v. Kennedy*, Pet. C. C. 30.

11. (April, 1818.) In actions of contract or tort, damages which materially and necessarily arise from the breach or *gravamen* need not be stated, as they are covered by the general damages laid in the declaration. Special damages, not necessarily implied, cannot be recovered unless specially stated; and although the plaintiff has given evidence of special damages, without objection by the defendant, yet the defendant may object to their allowance on the trial. *Bas v. Steele*, 3 Wash. 381.

12. (Oct., 1824.) If jurisdiction be not shown in the proceedings, no consent of parties can give it. No inference in favor of it can be drawn from the trial and judgment. *Bobyshall v. Oppenheimer*, 4 Wash. 482.

13. (April, 1866.) A suit was brought by a citizen of Illinois, in the Southern District of Ohio, upon a joint contract against two defendants, one of whom resided in said district, and the other in the State of Indiana. The declaration averred the residence of the defendants, and the return of the marshal showed

service on both, but the declaration did not aver that the defendant residing in Indiana was served within the Southern District of Ohio. *Held*, that in such a case it was not necessary to aver on the record that the defendant residing in Indiana was served within said district, and that by virtue of sec. 1 of the act of Feb. 28, 1839, jurisdiction was conferred upon the court to proceed to the trial and adjudication of such suit as against all parties regularly served with process. *McCloskey v. Cobb*, 2 Bond, 16.

14. (April, 1874.) To give jurisdiction against a married woman in a suit at law, her liability must appear in the proceedings affirmatively, and will not be inferred. *Albree v. Johnson*, 1 Flipp. 341.

15. In equity her separate property may be reached, and she may be charged, but at law she cannot confess judgment, and judgment by default may be set aside. *Ib.*

16. (Dec., 1839.) A declaration must contain a statement of facts which, in law, gives the plaintiff a right to recover. *Stanley v. Whipple*, 2 McLean, 35.

17. This is the question to be answered on a demurrer. But, after verdict, defects in substance are cured, if, from the issue in the case, the facts omitted or defectively stated may fairly be presumed to have been proved on the trial. *Ib.*

18. (Oct., 1840.) The existence of the bank is sufficiently stated in the declaration, though by way of recital. Facts are stated in the declaration which show that the defendants became a body corporate and politic, and this is sufficient without a special averment to that effect. *Falconer & Higgins v. Campbell et al.*, 2 McLean, 195.

19. The fact of incorporation is an inference of law. It is not necessary to aver that the law was passed by a constitutional majority. That question, if raised, must be raised by plea. Where the law bears upon its face the requisite authentication, the vote by which it was passed cannot be inquired into. *Ib.*

20. If the declaration is founded on an amendatory act which refers to and continues the provisions of a former act, it should conclude "against the form of the statute," and not statutes. *Ib.*

21. (Oct., 1842.) It is sufficient to state the title of the court in the caption of the declaration. *Gassett v. Palmer*, 3 McLean, 105.

22. The venue, if substantially laid, is sufficient; and so of other averments in the declaration. *Ib.*

23. (Oct., 1844.) If a count in a declaration contain sufficient averments, surplusage will not vitiate it. *Wyman v. Fowler*, 3 McLean, 467.

24. (April, 1851.) Where the cause of action is local, a reference to the "district aforesaid" named in any preceding count is a sufficient designation of the place. *Jones v. Vanzandt*, 5 McLean, 214.

25. Though a state be named which is in law a district, the reference being to the "district," a term used in the law, the reference will be held to mean the district before named, and not the state named. *Ib.*

26. (Nov., 1877.) The Circuit Court has not jurisdiction of a case irrespective of the citizenship of the parties, unless it arises out of a law of the United States; nor is an averment that an action arises out of such law sufficient to confer jurisdiction; but it must appear from the facts stated that it does so arise. *Dowell v. Griswold*, 5 Sawyer, 39.

27. An averment that the trial of an action will necessarily involve the construction of certain acts of Congress, does not show that such action arises out of such laws. *Ib.*

Declaration. Venue.

1. (Oct., 1841.) A venue in the body of the declaration is sufficient, without being stated in the margin. *Dwight v. Wing & Miller*, 2 McLean, 580.

2. By the present rules of pleading in England, a venue is laid only in the margin. *Ib.*

3. (April, 1839.) Every material and traversable fact was formerly required to be alleged with a *venue*, as it regulated the summoning of the jury, who were anciently always returned from the vicinage; but with us, in transitory actions, *venues* are of no practical utility. *Cage v. Jeffries*, Hempst. 409.

4. The jurisdiction of the court is not affected by the *venue* laid, or a wrong one, or by the entire omission to lay one. *Ib.*

5. When two states are named, one in the margin and the other in the body of the declaration, the words "state aforesaid" have a general reference to the state or *venue* in the margin. *Ib.*

Declaration. Duplicity.

1. (Oct., 1846.) Duplicity is the union of more than one cause of action in one count in a writ, or more than one defense in one plea, or more than a single breach in a replication, and not the union of several facts, constituting together but one cause of action, or one defense, or one breach. *Jackson v. Rundlet*, 1 Woodb. & M. 382.

2. (Sept., 1870.) Duplicity in pleading is forbidden by both the common law and the Code of Oregon, as tending to prolixity and confusion; but, under the code, objection to duplicity is to be made by a motion to strike out the pleading, rather than by special demurrer as at common law. *McKay v. Campbell*, 1 Sawyer, 374.

3. If a complaint contains more than one cause of action, they must be separately stated, or it will be liable to be stricken out for duplicity. *Ib.*

Declaration. Variance.

1. (April, 1793.) Nor is the objection to the variance between the declaration and the written contract, on account of the words "or order" being stated in the former, though not contained in the latter, material in point of law. It was unnecessary to set forth the written contract at all in the declaration; and it is only now offered as additional evidence to prove the parol bargain between the parties. In the case of a bond, bill of exchange, or promissory note, there would be more weight in the objection, because they are exclusively the evidence of the respective contracts to which they give existence, character, and operation; but the written paper, in the present instance, is of no more force than any other testimony of its contents would be. The words in the declaration must therefore be considered as surplusage, and do not affect the material parts of the charge. *Livingston v. Swanwick*, 2 Dall. 301.

2. (Feb., 1805.) A variance in date between the bond declared upon and that produced on *oyer* is matter of substance, and fatal upon the *plaintiff's* special demurrer to the defendant's bad rejoinder. *Cook v. Graham*, 3 Cranch, 229.

3. (Feb., 1817.) Variances between the writ and declaration are matters pleadable in abatement only, and cannot be taken

advantage of upon general demurrer to the declaration. *Duwall v. Craig*, 2 Wheat. 45.

4. (Feb., 1826.) Variances between the writ and declaration cannot be taken advantage of in the court below, after plea pleaded. *Chirac v. Reinicker*, 11 Wheat. 280.

5. *Quære*: Whether by the modern practice such variances can be taken advantage of at all. *Ib.*

6. If in any case a variance between the writ and declaration can be taken advantage of by the defendant in the court below, it seems to be an established rule that it cannot be done except upon oyer of the original writ, granted in some proper stage of the cause. *Ib.*

7. (Jan., 1832.) The declaration contained two counts. The first, setting out the cause of action, stated "for that whereas the said defendants and copartners, trading under the firm name of Josiah Turner and Company in the lifetime of said William, on the first day of March, 1821, were indebted to the plaintiffs, and being so indebted," &c. The second count was upon an *insimul computassent*, and began, "And also whereas the said defendants afterwards, to wit, on the day and year aforesaid, accounted with the said plaintiffs of and concerning divers other sums of money due and owing from the said defendants," &c. The defendants, to maintain the issue on their parts, gave in evidence to the jury that William Turner, the person mentioned in the declaration, died on the 6th of January, 1819; that he was formerly a partner with Josiah and Philip Turner, the defendants, under the firm name of Josiah Turner and Company; but that the partnership was dissolved in October, 1817, and that the defendants formed a copartnership in 1820. The defendants prayed the court to instruct the jury that there is a variance between the contract declared on and the contract given in evidence, William Turner being dead. BY THE COURT: The only allegation in the second count in the declaration, from which it is argued that the contract declared upon was one including William Turner with Joseph and Philip, is, "that the *said defendants* accounted with the plaintiffs." But this does not warrant the conclusion drawn from it. The defendants were Josiah and Philip Turner; William Turner was not a defendant, and the terms, the *said defendants*, could not include him. There was no variance between the contract declared upon in the second count and the con-

tract proved upon the trial, with respect to the parties thereto. *Schimmelpennick v. Turner*, 6 Pet. 1.

8. (Dec., 1866.) When a contract is alleged by the pleadings to have been made on a certain day, it is no variance to offer in evidence a written contract which took effect on a different day. *United States v. Le Baron*, 4 Wall. 642.

9. If it be proved that a bond bearing date the first day of the month did not become obligatory until the fifteenth, this is no variance, although the bond is counted on, in the pleadings, as a contract made on the first day of the month, and bearing that date. *Ib.*

10. (Dec., 1866.) An allegation of variance between the averments of a petition and the findings of the court, where there is no allegation that the findings were unwarranted by the proofs, or that the judgment does not conform to the law and justice of the case, as presented by the pleadings, will not be sustained. *Railroad Co. v. Lindsay*, 4 Wall. 650.

11. Such case comes within the thirty-second section of the Judiciary Act, curing imperfections, defects, or want of form in the pleadings or course of proceedings, except such as are specially demurred to. *Ib.*

12. (April, 1815.) When the declaration professes to set forth the specification in a patent, as part of the grant, the slightest variance is fatal, and the defendant is entitled to claim a nonsuit. In general, it is sufficient to state the grant in substance in the declaration. *Tryon v. White*, Pet. C. C. 96.

13. (May, 1811.) A variance between the declaration and bond is an erroneous description of the instrument referred to so that it does not appear to be the same when produced in evidence, either on oyer or at the trial. *Dixon v. United States*, 1 Brock. 177.

14. (May, 1838.) If there be a variance between the writ and declaration, advantage cannot be taken of it by motion, but the variance must be pleaded in abatement or set out by a special demurrer. *How v. McKinney*, 1 McLean, 319.

15. Oyer of the writ must be prayed, and as oyer of the writ is now refused in England under a rule of court, the variance between the writ and the declaration is not pleadable there. *Ib.*

16. (May, 1839.) An unsubstantial variance between the

note and the declaration, where the note is described in effect, will be disregarded. *Conant v. Wills & Bradley*, 1 McLean, 427.

Declaration. Matter in Dispute.

1. (Sept., 1825.) An omission of the averment of the value of the matter in dispute is a defect in substance, when necessary, to give jurisdiction. *Smith v. Jackson*, 1 Paine, 486.

2. (Nov., 1871.) The matter in dispute in ejectment suits in the United States courts, within the meaning of sec. 11, act of 1789, is the estate which is claimed in the declaration; and in order to give the court jurisdiction, the value of the estate must appear in the declaration or by proof. *Crawford v. Burnham*, 1 Flipp. 116.

3. (1877.) To give the Circuit Court jurisdiction, the matter in dispute must exceed, exclusive of costs, the sum of \$500; and, in actions upon a money demand, the court, in passing on the question of jurisdiction, will look to the amount stated in the body of the complaint, and will not be governed alone by the amount in the prayer for judgment. *Culver v. County of Crawford*, 4 Dill. 239.

4. In a suit seeking to recover an amount that is not fixed, and which amount can be ascertained only by trial, the plaintiff can obtain a standing in court by laying his damages at the requisite sum. *Ib.*

Declaration. Averment of Citizenship.

1. (Jan., 1839.) A declaration, in the Circuit Court of the United States for the Virginia District, stated the plaintiffs to be "merchants, and partners trading under the firm and by the name and style of Duval & Co., of Philadelphia, in Pennsylvania." This was insufficient to give jurisdiction to the court in the action, if the exception had been taken by plea, or by writ of error, within the limitation of such writ. *Ross v. Duval*, 13 Pet. 45.

2. (Jan., 1848.) Although the declaration began with an averment that the drawer and indorser were citizens of the same state (which of course would oust the jurisdiction of the Circuit Court), yet as it afterwards averred that the indorser, who was also the payee, was an alien and citizen of Texas, this

was sufficient to maintain the jurisdiction. *Bailey v. Dozier*, 6 How. 23.

3. (Dec., 1853.) Where a suit was brought, in which the plaintiff was described as a citizen of France, against the Pennsylvania Railroad Company, without any averment that the defendants were a corporation, under the laws of Pennsylvania, or that the place of business of the corporation was there, or that its corporators, managers, or directors were citizens of Pennsylvania, the absence of such an averment was fatal to the jurisdiction of the court. *Piquignot v. Pennsylvania Railroad Co.*, 16 How. 104.

4. (Dec., 1855.) Where a corporation is sued, it is not enough, in order to give jurisdiction, to say that the corporation is a citizen of the state where the suit is brought. But an averment is sufficient, when admitted by a demurrer, that the corporation was created by the laws of the state, and had its principal place of business there. *Lafayette Ins. Co. v. French*, 18 How. 404.

5. (Dec., 1858.) The decision of this court in 20 Howard, 227, as to what averment in the declaration is sufficient to give jurisdiction to the courts of the United States, again affirmed. *Covington Drawbridge Co. v. Shepherd*, 21 How. 112.

6. (Dec., 1865.) Where a contract, under which a party would be prevented, from want of proper citizenship, from suing in the federal courts, is set out but as inducement to a subsequent one, under which he would not be so prevented, the jurisdiction of such courts will not be taken away, from the fact of the old contracts being set forth as inducement only, somewhat indefinitely. Coming in such a case within the principle of a contract defectively stated, but not of one defective, the mode of stating it is cured by the verdict. *De Sobry v. Nicholson*, 3 Wall. 420.

7. (Dec., 1869.) An averment in the declaration, that the plaintiffs were a firm of natural persons, associated for the purpose of carrying on banking business, in Omaha, Nebraska Territory (a place which, at the time of the suit brought, was remote from the great centres of trade and commerce), and had been, for a period of eighteen months, engaged in that business, at that place, is equivalent to saying that they had their domicile there, and is a sufficient averment of citizenship. *Express Co. v. Kountze*, 8 Wall. 343.

8. An averment that the defendant is a foreign corporation,

formed under and created by the laws of the State of New York, is a sufficient averment that the defendant is a citizen of New York. *Ib.*

9. (Dec., 1869.) Where such citizenship as is necessary to give jurisdiction to the federal courts is not averred, the suit cannot be maintained. *Hornthall v. The Collector*, 9 Wall. 560.

10. (May, 1828.) Where an alien sues in the Circuit Court, the defendant must be described as a citizen of some particular state. Stating him to be a citizen of the United States is not sufficient. *Picquet v. Swan*, 5 Mason, 35.

11. (Oct., 1838.) It is not sufficient to give jurisdiction to the courts of the United States to allege that a party is an *alien*. There must also be an allegation that he is a subject or citizen of some one foreign state. *Wilson v. City Bank*, 3 Sumn. 422.

12. Nor is it sufficient to give jurisdiction, where a corporation is a party, to allege that all the corporators are *citizens of the United States*. There must be an allegation that the corporators are all citizens of some one or more state or states of the United States. *Ib.*

13. (Sept., 1825.) An omission of the averment of citizenship is a defect in substance, not cured by verdict, and which cannot be amended after judgment. *Smith v. Jackson*, 1 Paine, 486.

14. (Oct., 1826.) The averment of the citizenship of the parties, to give jurisdiction to a Circuit Court, is a necessary averment, and must be proved under the general issue. *Catlett & Keith v. Pacific Ins. Co.*, 1 Paine, 594.

15. (June, 1828.) To give the court jurisdiction, all the parties must be capable of suing; and the record must show affirmatively that the court has jurisdiction. *Anderson v. Jackson*, 2 Paine, 426.

16. (Aug., 1865.) In an amended declaration, it is proper to state the citizenship of the parties in the present tense, without stating such citizenship as having existed at the time of the commencement of the suit. *Birdsall v. Perego*, 5 Blatchf. 251.

17. (June, 1793.) A plaintiff in a federal court [who is an alien] must state himself to be the subject or citizen of a foreign state, in order to entitle the court to jurisdiction. And if he omits it, the defendant may take advantage of the omission by motion in arrest of judgment. *Shedden v. Custis*,¹ 1 Hughes, 246.

¹ Reported in 6 Call's Virginia Reports, 241.

18. (April, 1873.) The United States Circuit Court has jurisdiction of a suit brought against a citizen of the state in which the court is held, by a citizen of another state, upon a note payable to him or bearer, notwithstanding the note may have been indorsed to the plaintiff by payee, and although the declaration contains no averment that the payee could have sued. *Varner v. West*, 1 Woods, 493.

19. (Dec., 1871.) An averment in a declaration that a party defendant is a citizen of the Southern District of Alabama, is equivalent to an averment that he is a citizen of the State of Alabama, and is a sufficient averment of the latter fact. *Berlin & Son v. Jones*, 1 Woods, 638.

20. (June, 1869.) Suit was brought in the Circuit Court of the United States within the Southern District of Ohio, against the defendant, by the plaintiffs, and the marshal of said district made a return to the writ that defendant was served personally. The declaration averred defendant to be a citizen of Ohio, and the plaintiffs citizens of Iowa. *Held*, that it was not necessary, to give jurisdiction to the court, that the declaration should allege the defendant to be a resident of the Southern District of Ohio. *Vore v. Fowler*, 2 Bond, 294.

21. A Circuit Court of the United States has jurisdiction where the parties are citizens of different states, without reference to the division of a state into districts. *Ib.*

22. If the defendant is a citizen of the state, and process has been served in the proper district, the question of jurisdiction cannot prevail. *Ib.*

23. (May, 1838.) An averment of citizenship in the first count is sufficient to give jurisdiction to the court, although in the other counts there be no such averment. *Jones v. Heaton*, 1 McLean, 317.

24. (Dec., 1838.) In this case the writ issued against Henry Bennet and one Stewart. It was returned served on Bennet, *non est* as to Stewart.

The declaration averred that the plaintiff was a citizen of New York, and the defendant Bennet a citizen of Ohio, and that the writ which had issued against Stewart was returned *non est*, &c., no averment being made in the declaration of his citizenship.

A plea to the jurisdiction was filed. [Plea overruled, and jurisdiction as to Bennet sustained.] *Morrison v. Bennet*, 1 McLean, 330.

25. (June, 1840.) A general averment of the citizenship of the plaintiff is sufficient. *Thompson v. Cook*, 2 McLean, 122.

26. (June, 1840.) The assignee who sues in his own name must show, to give jurisdiction to the Circuit Court, that his assignor, at the time of the assignment, might have brought the suit in his own name. *Fontaine v. Aresta*, 2 McLean, 126.

27. The Circuit Court having only a limited jurisdiction, it must be shown in the pleadings. *Ib.*

28. (June, 1840.) A receiver in the State of Michigan, appointed under the act which provides for the voluntary dissolution of bank corporations, &c., stands in the relation of the assignee of an insolvent debtor. And if such receiver sue in the courts of the United States, he must show that the court could have taken jurisdiction as between the defendants and the bank. *Bradford v. Jenks*, 2 McLean, 130.

29. Though the note on which the suit is brought be payable to the bank or bearer, the receiver cannot sue as the bearer of the note, as he does not hold it in that right. He does not own, except as trustee, the property in the note, and did not receive it in the ordinary course of business. *Ib.*

30. A note payable to a payee named, or bearer, may be sued for by any person who received it in the course of business, in his own name, in the courts of the United States, without noticing the payee named. The promise to pay is as much to the bearer as to the person named. *Ib.*

31. *Quære*: Whether the assignee of an insolvent can sue, in his own name, in a foreign jurisdiction. *Ib.*

32. (June, 1841.) The citizenship of the party, which is to give jurisdiction to the court, must be specially averred. *Leavitt v. Cowles*, 2 McLean, 491.

33. That the plaintiffs are citizens of New York, to wit, of Illinois, where the suit is brought, is a repugnant averment. *Ib.*

34. (Oct., 1842.) Where an action is brought by the assignee of a promissory note or bill, the declaration must show that the assignor could have sued in this court. *Fry v. Rousseau*, 3 McLean, 106.

35. (June, 1845.) The citizenship of a person not served with process, who is a joint promisor, must appear in the declaration. *Burgh v. Page*, 4 McLean, 10.

36. (May, 1853.) Where the assignee sues on a promissory

note, the declaration must show that the assignor, by his citizenship, had a right to sue in this court. If this be not done, the declaration is demurrable. *Fletcher v. Turner*, 5 McLean, 468.

37. (May, 1869.) The defendant executed a note to S. Strous or order. Strous indorsed it in blank, and then redelivered it to the defendant, who thereupon delivered it to the plaintiffs. The declaration averred that it was an accommodation note, and that Strous never had any interest in it. *Held*, that under the eleventh section of the Judiciary Act the court has no jurisdiction of the case, unless it appear, by an averment in the declaration, that Strous, as well as the plaintiffs, is a citizen of a state other than Indiana. But the rule is otherwise as to foreign bills of exchange, bills and notes payable to bearer, and suits by indorsees against their immediate indorsers. *Noell v. Mitchell*, 4 Biss. 346.

38. (April, 1840.) The facts and circumstances upon which jurisdiction over the case depends must be set forth in the declaration or pleadings. *Donaldson v. Hazen*, Hempst. 423.

39. Where the jurisdiction does not appear on the face of the declaration, such omission may be taken advantage of by motion to dismiss the suit, at any time before final judgment, or after verdict, by motion in arrest of judgment, or by bringing a writ of error [*coram nobis*] and having the judgment reversed. *Id.*

40. (July, 1855.) An allegation in the complaint, of residence of the parties [in any particular district], is not necessary to impart jurisdiction. *Teese v. Phelps*, McAll. 17.

41. If a defendant is sued out of his district, he can plead his personal privilege. *Id.*

42. (July, 1856.) An averment of citizenship, equivalent in import to a direct allegation, is sufficient to give jurisdiction. *Bayerque v. Haley & Thompson*, McAll. 97.

Declaration. Assumpsit.

1. (Aug., 1797.) A declaration for foreign money, without averment of its value, is cured by the verdict finding the value. *Brown v. Barry*, 3 Dall. 365, 368.

2. (Feb., 1805.) In a declaration, the averment that the assignment of a promissory note was *for value received*, is an immaterial averment, and need not be proved. *Wilson v. Codman*, 3 Cranch, 193.

3. (Feb., 1808.) If A. agree, under seal, to do certain work for B., and does part, but is prevented by B. from finishing it according to contract, A. cannot maintain a *quantum meruit* against B. for the work actually performed, but must sue upon the sealed instrument. *Young v. Preston*, 4 Cranch, 239.

4. (Feb., 1823.) It is, in general, not necessary, in deriving title to a bill or note, through the indorsement of a partnership firm, or from the surviving partner, through the act of the law, to state particularly the names of the persons composing the firm. *Childress v. Emory*, 8 Wheat. 642.

5. A declaration averring that "J. C., by his agent, A. C., made" the note, &c., is good. *Ib.*

6. (Feb., 1824.) In a declaration upon a promissory note, the omission of the place where it is payable is fatal. *Sebree v. Dorr*, 9 Wheat. 558.

7. (Feb., 1826.) *It seems*, as against the *maker* of a promissory note, or against the *acceptor* of a bill of exchange, payable at a particular place, no averment in the declaration, or proof at the trial, of a demand of payment at the place designated, is necessary. *United States Bank v. Smith*, 11 Wheat. 171.

8. But, as against the *indorser* of a bill or note, such an averment and proof is, in general, necessary. *Ib.*

9. (Feb., 1826.) Where there is a special agreement open and subsisting at the time the cause of action arises, a general *indebitatus assumpsit* cannot be maintained. *Perkins v. Hart*, 11 Wheat. 237.

10. But if the agreement has been wholly performed, or if its further execution has been prevented by the act of the defendant, or by the consent of both parties, or if the contract has been fully performed in respect to any one distinct subject included in it, the plaintiff may recover upon a general *indebitatus assumpsit*. *Ib.*

11. (Jan., 1844.) Where the declaration alleges a partnership, and the jury find a general verdict, they must be presumed to have found that fact; and proof that the chose in action was indorsed in blank was sufficient to sustain the first count. The plaintiff has a right to elect in what right he sues. *Matheson v. Grant*, 2 How. 264.

12. (Dec., 1853.) There having been a special contract between the parties, by which the entire compensation was regulated and made contingent, there could be no recovery on a count for

quantum meruit. *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How. 314.

13. (Dec., 1859.) Where an indorsement upon a promissory note was made, not by the payee, but by persons who did not appear to be otherwise connected with the note, and the note thus indorsed was handed to the payee before maturity, a motion to strike out of the declaration a recital of these facts, and also an allegation that this indorsement was thus made for the purpose of guarantying the note, was properly overruled. *Rey v. Simpson*, 22 How. 341.

14. In Minnesota, where the transaction took place, suitors are enjoined by law, in framing their declarations, to give a statement of the facts constituting their cause of action; which statement is required to be expressed in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. *Ib.*

15. The facts above recited were a part of the facts constituting the cause of action, and therefore properly inserted in the declaration. *Ib.*

16. The declaration was sufficient, under the system of pleading which prevails in Minnesota. *Ib.*

17. (Dec., 1870.) An averment in a declaration that the defendants had made and delivered to the plaintiffs their promissory notes, implies that the instruments were, at the time, in the form and condition required by law. *Campbell v. Wilcox*, 10 Wall. 421.

18. (Oct., 1875.) By the statute of Illinois, the assignor of a promissory note is liable on his contract of assignment, only in case the assignee has, by the exercise of due diligence, obtained judgment against the maker, and a return of *nulla bona*, unless such suit would have been impracticable or unavailing.

Where the declaration avers that such suit would have been unavailing, and the defendant takes issue thereon, the record of an adjudication in bankruptcy against the maker of the note, before suit could have been brought thereon, is not only competent, but conclusive, evidence for the plaintiff. *Wills v. Clafin*, 2 Otto, 135.

19. The non-averment of any special fact or reason why such suit [against the maker of a promissory note] would have been unavailing, renders the declaration [against the assignor] bad on demurrer; but the defect is cured by verdict. *Ib.*

20. (Oct., 1876.) It is now the prevailing rule in this country, that a party may maintain assumpsit on a promise not under seal, made to another for his benefit. *Hendrick v. Lindsay*, 3 Otto, 143.

21. (Oct., 1816.) In assumpsit against a consignee or bailee of goods "to sell the same and render a reasonable account," damages for not remitting when exchange was favorable are not allowable. *Pope v. Barrett*, 1 Mason, 117.

22. *Quære*, how it would be if there was a special promise to remit, and a breach assigned in the declaration. *Ib.*

23. (May, 1827.) Where the declaration contains due averments of the presentment of a bill for acceptance, and due dishonor and notice to the drawer, proof of these averments is sufficient to maintain the suit, although there are subsequent averments in the declaration, of presentment for payment, non-payment, and notice thereof, which are not proved. *Wallace v. Agry*, 4 Mason, 336.

24. (Oct., 1846.) If a declaration is for money had and received (\$1,000), and also for a like sum for goods sold, in the usual form, and the plaintiff is described as a citizen of Rhode Island, and the defendants as citizens of Massachusetts, this court has *prima facie* jurisdiction in the case. *Brown v. Noyes*, 2 Woodb. & M. 75.

25. (Oct., 1849.) H. drew a bill of exchange on B. & Co., which B., one of the firm, accepted, for the accommodation of H., without restriction, and without the knowledge or consent of his copartners, and not in the course of the partnership business. The acceptance was made by B.'s writing the name of the firm on the bill. The bill, with the acceptance upon it, was discounted by the plaintiffs for H., and the proceeds applied in payment of paper then held by the plaintiffs on which H. was liable, the plaintiffs knowing at the time that the bill was accommodation paper. *Held*, that the plaintiffs were entitled to recover on the bill against B. as sole acceptor; and that such recovery could be had under a count in the declaration stating the bill to have been drawn on B. & Co., and to have been accepted by B. by the name and style of B. & Co., by writing the name of B. & Co. thereon. *City Bank v. Beach*, 1 Blatchf. 438.

26. (Oct., 1860.) A declaration on a promissory note, in a suit in this court, drawn in the form of a complaint, under the

New York Code of Procedure, is bad, on general demurrer. *Brownson v. Wallace*, 4 Blatchf. 465.

27. A claim of damages is necessary, as a matter of substance, in a declaration in an action of assumpsit; and a demand of judgment for the amount of the note proceeded on, and interest, in the form used in complaints under the New York code, is not such a claim of damages. *Ib.*

28. (March, 1868.) The proper form of a declaration, in an action of assumpsit, in this court, commented on. *Myers v. Davis*, 6 Blatchf. 77.

29. A count in such declaration, alleging a sale and delivery of property by a third party to the defendant, an agreement by the defendant to pay such third party so much money therefor, and an assignment of the claim of such third party to the plaintiff, but not alleging that the defendant ever undertook or promised the plaintiff to pay him the whole or any part of the claim, is bad, on general demurrer. *Ib.*

30. A count in such declaration, alleging a sale of property by the plaintiff and a third party to the defendant, for so much money, and an agreement by the defendant to pay that sum therefor, but not alleging that the promise was to pay at any specified time, or on demand or request, and alleging that the defendant had not paid any part thereof to the plaintiff or to such third party, that such third party assigned his interest in the demand to the plaintiff, and that the defendant, in consideration of the premises promised to pay such money to the plaintiff, but not alleging that the defendant promised the plaintiff, or that the promise was to pay at any particular time, or on demand or request, and not alleging any other consideration for the promise, or any request or refusal to pay, is bad, on general demurrer. *Ib.*

31. Another count in such a declaration, held bad, on general demurrer, and its defects pointed out. *Ib.*

32. (April, 1879.) On a general demurrer to a count in an action of account, the question is, whether the count is sufficient in substance, without regard to form; but sufficient must be alleged in some form to constitute a cause of action. *Travers v. Dyer*, 16 Blatchf. 178.

33. In the action of account there are two judgments, — one, that the defendant account with the plaintiff; the other, after the accounting, for the balance found due. *Ib.*

34. The declaration must show the privity by which the plaintiff is entitled to an account, and, also, proceedings under or pursuant to it, raising a balance in his favor, to be recovered. *Ib.*

35. Counts held bad for want of such averments. *Ib.*

36. (April, 1815.) In an action where the declaration stated that *E. Brown* was attached to answer, and proceeded to allege in his declaration, the drawing of a bill of exchange by *Elisha Brown*, evidence of a bill of exchange signed by *Elijah Brown*, cannot be given.

The plaintiff was allowed to take off a nonsuit and to amend the declaration, on payment of costs. *Craig v. Brown*, Pet. C. C. 139.

37. (Oct., 1816.) In an action on the case to recover the amount of an accepted bill of exchange, from the acceptor, the plaintiffs, who were payees and indorsers of the bill, cannot recover the damages and costs of suit which had been recovered against them by the indorsee of the bill, there being no money count in the declaration. *King v. Phillips*, Pet. C. C. 350.

38. (April, 1825.) Assumpsit for goods sold and delivered, money had and received, and *insimul computassent*. Plaintiff employed defendant as his agent to sell a parcel of goods, for a certain commission. He sold a part of them, and received part of the purchase-money, which, with the residue of the goods, he confided to a person whom he appointed as his clerk, and who ran off with the money and goods. The plaintiff cannot recover on the first and third counts, as no sale was made of these goods to the defendant, nor was any account settled and a balance struck between the parties. But the plaintiff is entitled to recover, under the second count, the amount of money received by defendant and lost by the perfidy of his agent. *Read v. Bertrand*, 4 Wash. 514.

39. (March, 1876.) *Indebitatus assumpsit* would be a proper form of action at common law to recover money paid as usury. Under the Code of Georgia, the action for open account would seem to be applicable. *Whitaker v. Pope*, 2 Woods, 463.

40. (Oct., 1869.) A declaration stating as the cause of action that the plaintiffs are the holders of certain bills of exchange drawn by the agent of the defendant, and accepted by him pursuant to a special agreement between the parties, averring that the bills were drawn on a sufficient consideration, and were duly

accepted by the defendant, and were protested for non-payment, is good on demurrer. *Railroad v. Thompson*, 2 Bond, 296.

41. It is no objection to the declaration that the plaintiffs set forth as the consideration on which the defendant agreed to accept and pay the bills, that the plaintiffs had agreed to transport mules and horses for the defendant, and had transported them according to agreement, and had drawn the bills in question as payment of the freight of the animals, whereby their right of action had accrued. *Ib.*

42. The cause of action set out in the declaration is substantially on the undertaking and promise of the defendant to accept and pay the bills as drawn, pursuant to the agreement between the parties, and his failure to perform that agreement. *Ib.*

43. (Oct., 1839.) An averment in the declaration that A. B., by C. D., made a certain bill or check is sufficient. *Sherman v. Comstock*, 2 McLean, 19.

44. The holder of a check must give notice to the drawer, if payment by the bank be refused. And a declaration on such an instrument is defective, if notice be not averred. *Ib.*

45. (Oct., 1839.) Where a note was given by Abbott and Layton, it is unnecessary in the declaration to aver a partnership. *Davis v. Abbott & Layton*, 2 McLean, 29.

46. The instrument shows a joint liability; and the declaration states the names of the defendants in full, and alleges that they, by the name and description of Abbott & Layton, executed the note. This, though not very technical, is sufficient. *Ib.*

47. (Dec., 1839.) Where a contract binds the defendant to pay five dollars for each stove sold, as in this case, the special contract need not be declared on; the amount received may be recovered on the general count for money had and received. *Stanley v. Whipple*, 2 McLean, 35.

48. (May, 1840.) It is sufficient [in the declaration] to describe the note in terms, or according to its legal effect. *Drake v. Fisher*, 2 McLean, 69.

49. (June, 1840.) Where a note has been assigned by a firm, it is unnecessary for the assignee to aver and prove the names of the persons who compose the firm. *Thompson v. Cook*, 2 McLean, 122.

50. This is the rule at common law; and there is nothing in the act of Congress, in regard to assignments, or in the limited jurisdiction of this court, which should change the rule. *Ib.*

51. Where a note was made payable at a particular place, the declaration need not aver that the note, when due, was presented at such place for payment. *Ib.*

52. (June, 1840.) It is not necessary to set out the note in terms in the declaration, but it is sufficient to state it according to its legal effect. *Spaulding v. Evans*, 2 McLean, 139.

53. (July, 1840.) Where the note is joint, the suit must be brought against all, and a joint responsibility must be shown [in the declaration], unless one or more of the promisors has been discharged by infancy, or by operation of law. *Woodworth v. Spaffords & Earl*, 2 McLean, 168.

54. (Oct., 1840.) If the indorsement be by two persons, and the declaration avers that it was indorsed by the defendants by the name of A. B., it is sufficient. *Kendall v. Freeman & Sibley*, 2 McLean, 189.

55. Where the contract shows a joint liability, it is unnecessary to allege or prove a partnership. *Ib.*

56. (May, 1841.) By statute in Indiana, the representatives of a deceased joint obligor may be sued, as on a joint and several obligation.

A declaration which alleges a promise by the deceased to pay, and also a promise by his administrators, though informal, is not bad on general demurrer. *Curtis v. Administrators of Bowrie*, 2 McLean, 374.

57. It is apparent from the whole declaration that the defendants are charged in their representative character, and not in their own right; and this is substantially good. *Ib.*

58. (Oct., 1841.) An averment of due notice is sufficient to charge the indorser of a note or bill. Under such an allegation, proofs of the facts may be made. *Dwight v. Wing & Miller*, 2 McLean, 580.

59. (June, 1842.) In an action against the assignor or guarantor of a note, the declaration must allege a demand on the drawer of the note when it became due. *January v. Duncan*, 3 McLean, 19.

60. (Oct., 1842.) An averment in the declaration that the note when due was presented to the bank for payment, to wit, 23d of July, 1841,—the words from “to wit,” &c., were held to be surplusage. *Hyslop v. Jones*, 3 McLean, 96.

61. (May, 1843.) An averment that the note was assigned on

the day or at the time of its execution, is sufficient. *Silver v. Henderson*, 3 McLean, 165.

62. Where an action is brought against two, as the survivors of one, who executed a joint note, it is not essential to allege in the breach that the note had not been paid by the deceased. *Ib.*

63. (May, 1866.) An averment that the defendant promised to pay the plaintiff reasonable commission as a factor, ought to be followed by an allegation of the reasonable value of such commission. *Rice v. Montgomery*, 4 Biss. 75.

64. (Jan., 1859.) In an action against a party primarily liable on a promissory note made payable at a particular place, demand for payment at that place need not be averred. *Kendall v. Badger*, McAll. 523.

65. If the maker was ready at the time and place to pay, it is matter of defense. *Ib.*

Declaration. In Case on Contract.

1. (Jan., 1846.) In an action on the case for injury sustained by the oversetting of a stage-coach, although the declaration does not set out the payment of any passage-money, nor any promise or undertaking on the part of the defendants to carry the plaintiff safely, yet if it states that the plaintiff became a passenger, for certain rewards to the defendants, and thereupon it was their duty to use due and proper care, that the plaintiff should be safely conveyed, and if the breach was well assigned, and the cause went on to plea, issue, trial, and verdict, the defect in the declaration is cured by the thirty-second section of the Judiciary Act of 1789. *Stockton v. Bishop*, 4 How. 155.

2. (Dec., 1863.) In an action for a false warranty, whether the action be in assumpsit or in tort, a *scienter* need not be averred; and, if averred, need not be proved. *Schuchardt v. Allens*, 1 Wall. 359.

3. (Dec., 1867.) In a suit against a common carrier, for not carrying a party according to contract, the allegation of a breach "whereby the plaintiff was subjected to great inconvenience and injury," is not an allegation of special damage. *Roberts v. Graham*, 6 Wall. 578.

4. (Oct., 1875.) . . . *Held*: 1. That the declaration of B. was sufficient on demurrer, as it averred, in substance, that from the

time he entered upon the performance of the contract in July, 1872, until the fifteenth day of December of that year, when A. wholly failed to make the stipulated payment for the work then actually done, he, with a large force and with suitable equipments along the whole line of the road, had prosecuted the work with all the energy and skill that he possessed, and that A. had expressed satisfaction at the manner in which the work was done. *Construction Co. v. Seymour*, 1 Otto, 646.

5. (Oct., 1833.) In stating a loss, it is sufficient to show it to have been occasioned by a peril within the policy, without negating the exceptions of losses from design, invasion, public enemies, riots, &c., which are properly matters of defense. *Catlin v. Springfield Fire Ins. Co.*, 1 Sumn. 434.

6. (Nov., 1848.) Where the declaration on such a policy [a time policy, against marine risk, for a succession of voyages] averred that, at the time of the loss of the vessel, H., the plaintiff, was interested in her to the amount of the said insurance, — *Held*, that it need not aver that H. was interested in her at the time of the insurance, or at the time of the commencement of the risk. *Henshaw v. Mutual Safety Ins. Co.*, 2 Blatchf. 100.

7. And where it averred that the insurance was for the use and benefit of H., as trustee for N., and that, as such trustee, H. was interested in the vessel at the time of her loss, — *Held*, that it need not set forth the nature or extent of the trust, they being matters of evidence. *Ib.*

8. (May, 1857.) If parties, in making a contract under which disputes are contemplated as possible, agree under seal to submit any such disputes to private arbitration, as, *e. g.*, to the award of some third person, so that his decision shall be final and conclusive on them both, it is a bar to any action on the contract that the plaintiff does not either aver and prove such award, nor aver and prove such facts as excuse it. *Fox v. The Railroad*, 3 Wall. Jr. 243.

9. (May, 1848.) The parties, plaintiff and defendants, entered into partnership, and afterwards, plaintiff selling out to the defendants his interest in the entire concern, dissolved the partnership, embracing personal and real estate; the defendants agreeing to pay Barbee \$6,872.72. In payment, the defendant French agreed to give his note for \$3,000 with interest, payable three years after date; and the other defendant agreed to convey

to plaintiff eight hundred acres of land and other tracts on or before May 1, 1842. Upon the execution of such deeds and the note for \$3,000 at the above date of May, 1842, Barbee was to execute a conveyance to the defendants of his interest in the partnership, &c.

The plaintiff avers he has always been ready. To the declaration there was a demurrer, which was sustained. *Barbee v. Willard & French*, 4 McLean, 356.

10. (May, 1853.) Where certain work was to be done by the defendant, and certain things were to be done by the plaintiffs to enable the defendant to perform his contract, the declaration must show that the precedent acts were done by the government to enable it to sustain an action for damages on the contract. *United States v. Beard*, 5 McLean, 441.

11. (1872.) Declaration construed, and first count held to set forth a parol contract by an insurance company to insure the specific cotton sued for. *Hening v. United States Ins. Co.*, 2 Dill. 26.

12. The parol contract of insurance set up in the declaration held to be valid, and not to be prohibited by the charter of the defendant, or by the statutes of Missouri, the provisions of which in this respect are considered. *Ib.*

13. (May, 1880.) In an action for the breach of a contract containing mutual conditions, performance or readiness to perform must be averred by the plaintiff. *Darland v. Greenwood*, 1 McCrary, 337.

14. (Nov., 1872.) Where a contract contains various substantive and independent stipulations, and there is a breach of more than one of such stipulations, there arise distinct causes of action, which should be pleaded separately. *Oh Chow v. Hallett*, 2 Sawyer, 259.

15. An allegation that the defendant failed to furnish transportation to laborers furnished the defendant by plaintiff, to his damage so many dollars, is not uncertain; but only nominal damage can be recovered under it. *Ib.*

16. (Nov., 1872.) T. W. agreed to furnish H. sixty-six or more men, at different rates of wages, to work upon the N. P. Railway for an indefinite time. In an action to recover a balance alleged to be due T. W. upon such contract, the plaintiff alleged that he had duly performed all the conditions thereof on his part.

Held, on a motion to make more certain, that the allegation was not sufficient, because the contract did not limit and settle what number of men, or for what term the plaintiff was bound to furnish them, and therefore the averment was uncertain. *Toy William v. Hallett*, 2 Sawyer, 261.

17. In an action upon such a contract, it is not sufficient to allege that, in pursuance thereof, there became due the plaintiff a certain sum of money, but it must be alleged what amount of labor was furnished under the contract, and that there is due or become due therefor so much money. *Ib.*

18. (Dec., 1874.) Where, by the express terms of the policy, "the proposals, answers, and declarations" made by the applicant are made a part of the policy, they should be stated in the complaint, in an action founded upon the policy. *Bidwell v. Connecticut Mutual Life Ins. Co.*, 3 Sawyer, 261.

Declaration. Debt.

1. (Feb., 1803.) A declaration in debt, under the law of Virginia, upon a protested bill of exchange for the principal, interest, damages, and *costs of protest*, must aver the *amount* of those costs of protest. *Wilson v. Lenox*, 1 Cranch, 193.

2. *Quere*: Whether it be necessary to aver protest for non-acceptance, in an action on protest for non-payment. *Ib.*

3. (Feb., 1823.) Debt against an executor should be in the *detinet* only, unless he has made himself personally responsible, as by a *devastavit*. *Childress v. Emory*, 8 Wheat. 642.

4. An action of debt lies upon a promissory note against executors. *Ib.*

5. (Jan., 1828.) When, upon a submission by one partner of all matters in controversy between the partnership and the person entering into the agreement of reference, an award was made directing the payment of money, in an action on the bond to abide by the award, the breach assigned was that the partner who agreed to the reference did not pay, &c., this is a sufficient assignment of a breach, as he only who agreed to the reference was bound to pay. *Karthauss v. Ferrer*, 1 Pet. 222.

6. (Jan., 1828.) It has become a settled practice in declaring, in an action upon a judgment, not, as formerly, to set out in the declaration the whole of the proceedings in the original suit, but

only to allege generally that the plaintiff, by the consideration and judgment of that court, recovered the sum mentioned therein, the original cause of action having passed *in rem judicatum*. *Biddle v. Wilkins*, 1 Pet. 686.

7. (Jan., 1843.) Where the date of a surety bond is subsequent to the appointment of the principal to office, the declaration should allege that the money collected by the principal remained in his hands at the time when the surety bond was executed. *United States v. Linn*, 1 How. 104.

8. (Dec., 1850.) Where a creditor brought an action against an executrix in the Circuit Court of the United States for Louisiana, and the petition only averred that the petitioner was shown to be a creditor, by the accounts in the state court, which had jurisdiction over the estates of deceased persons, and then proceeded to charge the executrix with a *devastavit*, and exceptions were taken to the petition as insufficient, these exceptions must be sustained. *McGill v. Armour*, 11 How. 142.

9. The petition should have gone on to allege further proceedings in the state court, analogous to a judgment at common law, as a foundation of a claim for a judgment against the *executrix de bonis propriis*, suggesting a *devastavit*. *Ib.*

10. The laws of Louisiana provide for compelling the executrix to file a tableau of distribution, which is a necessary and preliminary step towards holding the executrix personally responsible. The petition, not having averred this, was defective, and the exceptions must be sustained. *Ib.*

11. (Dec., 1853.) A declaration was sufficient which averred that "at a general term of the Supreme Court in equity for the State of New York," &c. Being thus averred to be a court of general jurisdiction, no averment was necessary that the subject-matter in question was within its jurisdiction. And the courts of the United States will take notice of the judicial decisions in the several states in the same manner as the courts of those states. *Pennington v. Gibson*, 16 How. 65.

12. (Dec., 1855.) Where, in an action upon a sheriff's bond, the declaration did not charge the sheriff with a breach of his duty in the execution of any writ or process in which the real plaintiff was personally interested, but with a neglect or refusal to preserve the public peace, in consequence of which the plaintiff suffered great wrong and injury, from the unlawful violence

of a mob, the declaration did not set forth a sufficient cause of action against the sheriff and his sureties. *South v. Maryland*, 18 How. 396.

13. The powers and duties of a sheriff explained, and the difference pointed out between his ministerial and judicial functions. *Ib.*

14. It is only for a breach of his duty in the execution of the former that the sheriff and his sureties are liable upon his bond, and the declaration in this case does not set out such a breach. *Ib.*

15. (Dec., 1869.) A holder of coupons which have been cut off from the bond to which they were originally attached may bring suit on them, if they represent interest already due, notwithstanding he be no longer holder of the bond to which they belonged. He need not, if he declares properly, produce the bond. *The City v. Lamson*, 9 Wall. 477.

16. In suing on the coupons, in such case, it is proper enough to recite the bonds in such general way as explains and brings into view the relation which the coupons originally held to the bonds, and in some respects still hold. *Ib.*

17. The suit does not, by such recital, that is to say, by one in the nature of inducement and by way of preamble only, become a suit upon the bond. It is still a suit on the coupons. *Ib.*

18. (Dec., 1871.) Though statutes oblige receivers to pay over, when required by the secretary of the treasury, a declaration, stating that the receiver had been often requested to pay, is enough after verdict, there having been general regulations in force at the time the bond here sued on was given, requiring receivers to pay at stated times. *Boyden v. United States*, 13 Wall. 17.

19. (Oct., 1875.) Where a judgment is described in the declaration as having been rendered in the Circuit Court for the *District* of Wisconsin, a judgment of the *Circuit* Court for the *Eastern District* of Wisconsin is not admissible in evidence under the plea of *nul tiel record*. *Dow v. Humbert*, 1 Otto, 295.

20. (Oct., 1877.) Under sec. 3177 of the Revised Statutes, authorizing any collector, deputy collector, or inspector to enter, in the daytime, any building or place where any articles or objects subject to a tax are made, produced, or kept, within his district, so far as it may be necessary for the purpose of examining said articles or objects, the United States brought suit against the cashier of a national bank, having charge of its place of business, where were kept checks drawn upon and paid

by it, who refused to permit the collector of the proper district to examine said bank checks. *Held*, that the declaration was bad in not alleging that the paid checks on the bank remaining in its possession were not duly stamped at the time they were made, signed, and issued. *United States v. Mann*, 5 Otto, 580.

21. (Oct., 1877.) Where, in an action against a county, to recover the amount due on coupons detached from bonds issued by it, in payment of its subscription to the capital stock of a railroad company, the declaration avers that the plaintiff is a *bona fide* holder of them for value, before maturity, and such averment is traversed, it is competent for him, notwithstanding the presumption of law in his favor, to maintain the issue by direct affirmative proof. *County of Macon v. Shores*, 7 Otto, 272.

22. (Oct., 1880.) Where a municipal corporation, being thereto authorized upon the performance of certain prerequisites, has issued its bonds, which get into circulation as commercial securities, — *Held*, that they are *prima facie* binding on the corporation according to the terms and conditions expressed on their face, and that in an action on them, or the coupons thereto attached, the plaintiff need not aver such performance. *Lincoln v. Iron Company*, 13 Otto, 412.

23. Want of such performance, when in any case available to defeat a recovery, must be set up by the corporation. *Ib.*

24. (Oct., 1880.) The fact that the coupons are made payable at a particular place does not make it necessary to aver or prove a presentation of them for payment there. *Walnut v. Wade*, 13 Otto, 683.

25. (June, 1822.) If an obligee tear off the seal, or cancel a bond in consequence of fraud and imposition practised by the obligor, he may declare on such mutilated bond as the deed of the party, and set forth the special facts in the *profert*. *United States v. Spalding*, 2 Mason, 478.

26. Where a *profert* is made of a bond, and the declaration goes on to state the condition, and to assign a breach, it is not necessary to make a separate *profert* of the condition, for the whole bond is already before the court. *Ib.*

27. The condition of a bond, among other things, was that the party should produce the certificates and other proofs required by law, of the landing of the merchandise at some foreign port, &c., within two years, &c. *Held*, that a breach negating, in

the terms of the condition, the production of such certificates and other proofs was good. *Ib.*

28. (Oct., 1854.) Ordinarily, notice of an award need not be averred; *aliter*, if it be specially provided in the submission that notice shall be given to the parties. *Matthews v. Matthews*, 2 Curt. C. C. 106.

29. An averment that an award was duly published, is equivalent to an averment that the notice of the award required by the submission was given. *Ib.*

30. An action of debt lies for two sums, distinctly awarded, the one for damages and the other for costs; and the omission to add them together and go for the sum of both, as a sum single, is bad only on special demurrer. *Ib.*

31. A count on an award, that on the delivery of a release and the payment of a sum of money by the defendant to the plaintiff the plaintiff was to deliver a release to the defendant, no averment of readiness or offer by the plaintiff to release the defendant is bad on general demurrer. *Ib.*

32. A count showing differences, a submission of them, an award upon those differences of a sum of money to the plaintiff, though very general, is good on general demurrer. *Ib.*

33. (April, 1846.) The penalty imposed by sec. 11 of the Copyright Act of Feb. 3, 1831 (4 Stat. at Large, 438), for putting the imprint of a copyright upon a work not legally copyrighted, and given by the act to "the person who shall sue for the same," cannot be recovered in the name of more than one person. *Ferrett v. Atwill*, 1 Blatchf. 151.

34. A declaration for such penalty in the name of two persons is bad on general demurrer. *Ib.*

35. In an action on a statute, the party prosecuting must allege every fact necessary to make out his title and his competency to sue. *Ib.*

36. (Dec., 1871.) In an action on a judgment of the Superior Court of Chicago, Ill., the declaration averred that that court was a court of general jurisdiction, duly created by the laws of Illinois, but did not aver that the court had jurisdiction of the person of the defendant, either by service of process, appearance, or otherwise. *Held*, on demurrer, that the declaration was sufficient. *Tenney v. Townsend*, 9 Blatchf. 274.

37. (May, 1877.) A bond to the United States, signed and

sealed by W., G., C., and M., and acknowledged by each as his act, recited that W. and G., composing the firm of A. & Sons, as principal, and C. and M., as sureties, were held, &c., jointly and severally, to the United States, in the sum of \$9,000, and was conditioned that the firm of A. & Sons should pay all taxes assessed upon tobacco manufactured by the firm. W. and C. died, and H. was appointed administratrix of W. The United States then brought suit on the bond against H., as administratrix of W., and G. and M., claiming a judgment for \$9,000. On demurrer to the complaint by H., *held*, —

(1.) That as the complaint set forth a several obligation by the obligors, it was good, because, by the law of New York, a several liability could be enforced in one suit against all the defendants.

(2.) That this was so, although H. was sued as administratrix, and the others as individuals.

(3.) That the bond was not the obligation of the firm, and that, therefore, it was not necessary to exhaust all remedies against G., as surviving partner of the firm, before suing on the bond. *United States v. Lawrence*, 14 Blatchf. 229.

38. (April, 1815.) Debt on an embargo bond. The declaration demanded \$20,000, and recited the statute which authorizes the United States to demand a sum not exceeding \$20,000, and not less than \$1,000, which it averred that the defendant owed and detained. The jury found a verdict for \$4,000. Upon a motion to arrest the judgment, this declaration was held to be good. *United States v. Colt*, Pet. C. C. 145.

39. A declaration in debt claiming no precise sum to be due is without precedent. But the demand of one sum in the declaration does not prevent the recovery of a smaller sum, diminished by extrinsic circumstances. *Ib.*

40. (May, 1811.) The assignment of breaches in an action upon an embargo bond is a part, and a very important part, of the declaration. And, upon demurrer to the declaration, the plaintiff's attorney will not be permitted to strike out the assignment of breaches, on the ground that the declaration is good without it. Such a course would not be tolerated in any court. *Dixon v. United States*, 1 Brock. 177.

41. (April, 1878.) On demurrer to a declaration on an official bond of a collector of taxes. *Held*, that where the bond does not identify the district in which the officer is to act, nor the date

of his commission, nor the sort of taxes which the officer was to collect, nor the date of the act of Congress under which the bond was given, and the condition of the bond is that the officer shall faithfully execute and discharge all the duties of "said office," — in such case the declaration is demurrable and defective. *United States v. Jackson*, 3 Hughes, 231.

42. (April, 1866.) To justify a judgment for a penalty for putting the word "patent" on an unpatented article, the declaration must allege, and there must be proof on the trial, that the article was legally the subject of a patent. *United States v. Morris*, 2 Bond, 24.

43. (Feb., 1867.) In a declaration on a bond, several breaches may be assigned in the same count. *United States v. Truesdell*, 2 Bond, 78.

44. (Nov., 1840.) A declaration which charged a receiver of public moneys with not paying moneys which came into his hands the day after his bond expired is bad on demurrer. *United States v. Spencer*, 2 McLean, 265.

45. (May, 1841.) Where the defendant may replevy the judgment and suspend the execution for six months [Indiana], a declaration against the marshal and his sureties which avers that he neglected to make the money is defective. *Bispham v. Taylor*, 2 McLean, 355.

46. The declaration must negative every presumption of duty on his part. *Ib.*

47. An averment in the declaration that the marshal took insolvent sureties, and not freeholders, is sufficient to charge him. *Ib.*

48. (May, 1841.) In a declaration on a marshal's bond, it is not necessary to aver that the penalty has not been paid. The usual averment of the breach of the condition is sufficient. *Sperring & Laforgue v. Taylor*, 2 McLean, 362.

49. (May, 1841.) A declaration in *debt* on simple contract is bad, if it allege the defendant *promised* to pay. The word *agreed*, instead of *promised*, should be used. *Metcalf v. Robinson*, 2 McLean, 363.

50. The action of debt is founded upon the contract; the action of assumpsit on the promise; and this is the principal distinction between the two actions. *Ib.*

51. Though the declaration, in other respects, have the form

of debt, yet if it allege a promise, it has the form of assumpsit, and not of debt. *Ib.*

52. (May, 1841.) The legal effect of a bond or note, payable on or before the day, is different from one payable on the day. In the one case the obligor has a right to pay before the day, but not in the other. And this difference is material when the instrument is described [in the declaration] according to its legal effect. *Kikindal v. Mitchell*, 2 McLean, 402.

53. (May, 1841.) The sureties in a receiver's bond can only be made liable for moneys received by the receiver subsequently to the date of the bond. And if the bond bears date some months after the official term of the receiver commenced, the declaration is defective if it do not show the receipt of the money after the date of the bond and before the expiration of the official term of the receiver. *United States v. Spencer*, 2 McLean, 405.

54. (June, 1849.) A breach alleged in the terms of the bond is sufficient. *Berger v. Williams*, 4 McLean, 577.

55. (Oct., 1852.) No action can be brought on a bond of indemnity unless the plaintiff has been damnified. And this must be shown in the declaration. A general averment of loss is insufficient. *Coe v. Rankin*, 5 McLean, 354.

56. (May, 1869.) Debt will lie upon a penal statute. It lies whenever the obligation is to pay a sum certain, or which may be readily rendered certain, whether the liability arises on simple contract, legal liability, specialty, record, or statute. *Union Iron Co. v. Pierce*, 4 Biss. 327.

57. When the charter of a corporation provides that, where its officers shall neglect to make and publish certain reports required, they shall be individually liable for all corporation debts contracted while they are officers or stockholders, and when, while they were such, they were guilty of such neglect, and in the mean time the corporation became indebted to the plaintiff by note, — *Held*, that he might maintain an action of debt therefor against such delinquent officers. *Ib.*

58. (1872.) In a suit upon a marshal's bond the petition should ask judgment for the damages sustained, and not for the whole penalty of the bond. *Adler v. Newcomb*, 2 Dill. 45.

Declaration. Covenant.

1. (Feb., 1808.) An action may be supported on a covenant of *seisin*, although the plaintiff has never been evicted; and the declaration need not aver an eviction. *Pollard v. Dwight*, 4 Cranch, 421.

2. (Feb., 1810.) It is not necessary that a breach of covenant be assigned in the very words of the covenant. It is sufficient if it show a substantial breach. *Fletcher v. Peck*, 6 Cranch, 87.

3. (Feb., 1817.) Manner of assigning breaches upon the covenants of title, &c. *Duwall v. Craig*, 2 Wheat. 62, *note c*.

4. (Feb., 1825.) In a declaration upon a covenant of warranty, it is necessary to allege substantially an eviction by title paramount; but no formal terms are prescribed in which the averment is to be made. *Day v. Chism*, 10 Wheat. 449.

5. Where it is averred in such a declaration "that the said O. had not a good and sufficient title to the said tract of land, and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law," it was held sufficient as a substantial averment of an eviction by title paramount. *Ib*.

6. Where the plaintiffs declared in covenant, both as heirs and devisees, without showing in particular how they were heirs, and without setting out the will, it was held not to be fatal on general demurrer. *Ib*.

7. Such a defect may be amended under the thirty-second section of the Judiciary Act of 1789, ch. 20. *Ib*.

8. (Jan., 1849.) Where the complainant and respondent in a suit in chancery entered into a mutual covenant, that, pending the suit, they would divide the money between them in certain proportions, and that if, in the said suit, it should be decreed that these were not the correct proportions, they would respectively pay the difference, so as to conform to the decree; and the result of said suit was a dismissal of the complainant's bill with costs; and the respondent brought an action of covenant against the complainant, reciting the agreement in his declaration, with an averment that, by virtue of the decree of dismissal, he was entitled to receive a certain sum of money,—this declaration was bad. *McDonald v. Hobson*, 7 How. 745.

9. The agreement looked to a judicial determination of the rights of the parties, in some court of law or equity, and the

declaration omits all averment that these rights had been so settled. *Ib.*

10. The decree of dismissal did not, of itself, prove that the complainant owed the respondent anything. It only proved that the respondent was not indebted to the complainant. *Ib.*

11. Nor is this defect in the declaration cured by a verdict. It cannot be presumed that evidence was given upon the trial to show that some decree had adjusted the amount due, as claimed in the declaration; because this would be presuming against the record, which recites the substance of the decree. A total omission to state any cause of action is a defect which a verdict will not cure. *Ib.*

12. The averment of the *virtute cuius* is insufficient, either as matter of law or fact: as law, because no such legal consequence could follow from the premises; and as fact, because the averment was in contradiction to the record itself. *Ib.*

13. (Jan., 1850.) It was not necessary in the declaration to allege an eviction, because the covenant was broken as soon as made. *Le Roy v. Beard*, 8 How. 451.

14. (Dec., 1869.) Where the covenant in a submission to arbitration, after referring certain claims to the decision of arbitrators, and an umpire, if necessary, adds the words, "as provided in articles of submission this day executed," and no such articles, in fact, ever had any existence, the declaration in an action for breach of the covenant need not refer to any such articles. Proof that no such articles ever had any existence will answer any objection of a variance between the covenant stated in the declaration and the covenant contained in the submission. *Smith v. Morse*, 9 Wall. 76.

15. (Oct., 1875.) In an action of covenant, evidence of a parol contract is inadmissible. Had the declaration averred such a contract, it would have been bad on demurrer in the courts of Illinois, as the common-law rules of pleading and the distinction between forms of action prevail in that state. *Construction Co. v. Seymour*, 1 Otto, 647.

16. (April, 1825.) Covenant will not lie upon words in an instrument inserted by way of condition or defeasance, by the performance of some collateral act. *United States v. Brown*, 1 Paine, 422.

17. So upon a penal bond, conditioned that one should ac-

count for public moneys, property, &c.,—*Held*, that covenant would not lie upon the condition. *Ib.*

18. But covenant will lie upon the bond itself; but the breach assigned must be the non-payment of the penalty. *Ib.*

19. Where covenant was brought upon the bond itself, and the breach assigned was the non-performance of the condition, it was *held* bad on demurrer. *Ib.*

20. (July, 1866.) Rules of pleading, applicable to a declaration for the breach of a covenant, stated. *Wilcox v. Cohn*, 5 Blatchf. 346.

21. Only so much of the covenant as is essential to the cause of action should be set forth. *Ib.*

Distinct breaches of separate covenants may be assigned in the same count. *Ib.*

22. It is sufficient to assign a breach of the covenant according to its legal effect, or in words which contain its sense and substance. *Ib.*

23. The performance of a condition precedent must be averred; but matters of defense need not be anticipated and negatived. *Ib.*

24. (March, 1864.) It is not a breach of the covenant of warranty of seisin to show a conveyance by the defendant's grantor subsequent to the conveyance to defendant. It should be alleged that there was a valid and subsisting title in the grantor at the time the deed was made, upon which the breach is alleged. *Vorhis v. Forsythe*, 4 Biss. 409.

Declaration. Infringement of Patent-right.

1. (Dec., 1854.) Where the patent was signed by an acting commissioner of patents, it was not necessary to aver or prove that he was legally entitled to act in that capacity. The court will judicially take notice of the persons who preside over the Patent Office, whether they do so permanently or transiently. *York & Maryland Line Railroad Co. v. Winans*, 17 How. 31.

2. (May, 1833.) If the declaration upon an assignment of a patent-right omit to state that the assignment has been duly recorded in the State Department, the defect is cured by a verdict for the plaintiff. *Dobson v. Campbell*, 1 Sumn. 319.

3. (Nov., 1846.) In a declaration on letters-patent for an invention, it is not necessary to aver at what specific time the

invention patented was made ; it need only be before the application for the patent. *Wilder v. McCormick*, 2 Blatchf. 31.

4. The grant of letters-patent is itself sufficient evidence that all the preliminary steps required by law were properly taken by the patentee ; and it is not necessary, in a declaration on a patent, to plead the taking of any of those steps. *Ib.*

5. A declaration on a patent must tender an issue on the novelty and utility of the discovery patented ; but it need not show the regularity of the proceedings in the Patent Office preliminary to the grant. *Ib.*

6. A declaration on a patent, which avers the patent and specification to be "in language of the *import* and to the effect following," and then sets them forth *in hæc verba*, is sufficient, and is not open to the objection that the patent is not set forth according to its legal *tenor* and effect. *Ib.*

7. An averment that the patent and specification are "ready in court to be produced," is equivalent to a *profert* in its most formal terms. *Ib.*

8. A reiteration of infringements of a patent may be sued for in one action. *Ib.*

9. A declaration for the infringement of a patent, commencing in *case*, and concluding by demanding *actual damages* in gross, in compensation of the wrong, is good. *Ib.*

10. Where a declaration on a patent, though not formal, embodies all that is essential to enable the plaintiff to give evidence of his right and of its violation, and affords to the defendant the opportunity to interpose every defense allowed him by law, the court will not encourage mere critical objections, and will seek, even on special demurrer, to sustain the declaration. *Ib.*

11. (April, 1815.) It is not a foundation for a nonsuit that the declaration for an invasion of a patent-right does not lay the act complained of to be "against the form of the statute" under which the rights of the plaintiff are derived. *Contra formam statuti* is a matter of form, and may be cured by verdict. *Tryon v. White*, Pet. C. C. 96.

12. (Oct., 1817.) The declaration ought always to show a title in the plaintiff, and that with sufficient certainty, and to set forth all the matters which are the essence of the action. Without these, the plaintiff fails to show a right in point of law to ask the court for judgment in his favor. *Gray v. James*, Pet. C. C. 476.

13. If the plaintiff's title depends upon the performance of certain acts, he must affirm the performance of those acts. *Ib.*

14. What defects are cured by verdict. *Ib.*

15. Where the declaration describes the plaintiff's improvement in the words of the patent, it is not necessary that the description of the machine as stated in the specification should be set forth. If the defendant require the specification in his defense, he may have it placed on the record by asking *oyer* of it. *Ib.*

16. (July, 1843.) In a declaration, the improvement [in a patented machine] must be stated as an essential part of the plaintiff's right; and if this be not done, the declaration is demurrable. *Peterson v. Wooden*, 3 McLean, 248.

17. (June, 1848.) An averment in the declaration, that the defendant has made the thing "in imitation of the patent," is sufficient to sustain the action. *Parker v. Haworth*, 4 McLean, 370.

18. (May, 1849.) To show a violation of the patent, the declaration need only aver that the defendant has constructed, used, and sold to others the things patented. *Case v. Redfield & Puett*, 4 McLean, 526.

19. (June, 1850.) A declaration which states a right thus acquired [by purchase of an invention before patent was obtained], after the issuing of the patent, against an assignor, is not demurrable. *Rathbone v. Orr & Hollister*, 5 McLean, 131.

20. (Sept., 1875.) In a suit in equity, brought for an account of the gains and profits alleged to have accrued from making and using certain inventions patented, and for an injunction against further infringement, the court made an order staying all proceedings in the suit until the plaintiffs could bring an action at law to determine the legal rights to the alleged invention,—*Held*, that reference to the suit and to the order of the court, in the complaint in the action at law to show the limited purpose of the action, is not irrelevant or redundant. *Knox v. Great Western Quicksilver Mining Co.*, 3 Sawyer, 422.

Declaration. Ejectment.

1. (Jan., 1828.) In a trial of an action of ejectment, in which, according to the provisions of the laws of Tennessee, the defend-

ant was held to bail, the declaration stated two demises, by H. and K., citizens of Pennsylvania; and the other the demise of B. and G., citizens of Massachusetts. The cause coming on for trial before a jury, the plaintiff suffered a nonsuit, which was set aside; and the court, on the motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of S., a citizen of Missouri. The parties went to trial without any other pleadings; and the jury found for the plaintiff, upon the third, or new count, and a judgment was rendered in his favor. *Held*, to be valid. *Wright v. Hollingsworth*, 1 Pet. 165.

2. (Jan., 1832.) A count in the declaration in an ejectment, on a demise from a different party, asserting a different title, is not distinguishable, so far as respects the act of limitations, from a new action. *Sicard v. Davis*, 6 Pet. 125.

3. (Jan., 1832.) Formerly it was necessary to describe the premises for which an action of ejectment was brought, with great accuracy; but far less certainty is required in modern practice. All the authorities say that the general description is good. The lessor of the plaintiff, on a lease for a specific number of acres, may recover any quantity of less amount. *Barclay v. Howell*, 6 Pet. 498.

4. (Jan., 1837.) In the State of Tennessee, the uniform practice has been for tenants in common in ejectment to declare in a joint demise, and to recover a part or the whole of the premises declared for, according to the evidence adduced. *Poole v. Fleegeer*, 11 Pet. 186.

5. (June, 1828.) To sustain an action of ejectment, an averment of seizin is essential; and it must be alleged to have been within the time limited for bringing the action. *Bockee v. Crosby*, 2 Paine, 432.

6. (Oct., 1826.) In ejectment, where the value of the matter in dispute is not averred in the declaration, evidence cannot be given of it by the defendant. If intended to be controverted, it should have been put in issue by plea; but the court will not admit such a plea pending the trial. *Lessee of Lanning v. Dolph*, 4 Wash. 624.

7. The value of the land not being stated in the declaration, the court, pending the trial, on motion, dismissed the suit; condemning at the same time the practice which had prevailed, of deciding a question of jurisdiction, except on a plea to it,

and expressing a willingness at any time to hear the question discussed. *Ib.*

8. (March, 1868.) An allegation in the complaint, that the defendants held certain premises as tenants thereof to the plaintiffs under a demise to them for a certain rent, imports a tenancy for a term. *Parrott v. Barney*, Deady, 405.

Declaration. Writ of Entry.

1. (Oct., 1846.) A declaration is not good, in a writ of entry, to foreclose a mortgage, unless counting on a mortgage, and using words to show that a foreclosure is desired, rather than possession to take the profits. *Fiedler v. Carpenter*, 2 Woodb. & M. 211.

Declaration. Tort.

1. (Dec., 1866.) In a suit caused by a person's falling into an area in a public sidewalk, a declaration charging that the defendant "*dug, opened, and made*" the area, is sustained by proof that he formed it partially by excavation and partially by raising walls. *Robbins v. Chicago City*, 4 Wall. 657.

2. (Oct., 1877.) A declaration, in an action for the wrongful conversion of the shares of the capital stock of a corporation, is sufficient for the purposes of pleading, if it states the ultimate fact to be proven. The circumstances which tend to prove that fact can be used for the purposes of evidence; but they have no place in the pleadings. *McAllister v. Kuhn*, 6 Otto, 87.

3. (Oct., 1878.) To sustain an action for malicious prosecution, the failure of the proceedings against the plaintiff must be averred, &c. *Stewart v. Sonneborn*, 8 Otto, 187.

4. (Oct., 1850.) The office of the *innuendo* in a declaration for slander is to explain the words spoken, and annex to them their proper meaning. It cannot extend their sense beyond their usual and natural import, unless something is put upon the record by way of introductory matter, with which they cannot be connected; then, words which are equivocal or ambiguous, or fall short, in their natural sense, of importing any libellous charge, may have fixed to them a meaning certain and defamatory, extending beyond their ordinary import. *Beardsley v. Tappan*, 1 Blatchf. 588.

5. (Nov., 1866.) In a declaration founded on a libel, the whole of the libel must be considered, upon the point as to whether the averments in the declaration are sufficient to make the libel applicable to the plaintiff. *Cook v. Tribune Association*, 5 Blatchf. 353.

6. (Jan., 1871.) Where an assignee in bankruptcy, in the declaration in an action of trover brought by him, undertakes to set out in detail the manner in which he claims to have become the owner of the property which is the subject of the suit, by alleging the proceedings in bankruptcy, he must allege an adjudication of bankruptcy, or his declaration will be held bad, in substance, on demurrer. *Wright v. Johnson*, 8 Blatchf. 150.

7. (Nov., 1877.) Where a declaration sets forth as the cause of action fraudulent representations made to induce, and which did induce, a sale of goods on credit, the averments of fraud will not be stricken out, on the motion of the defendant, so as to make the action only one of assumpsit for goods sold and delivered. *Walker v. Byrnes*, 14 Blatchf. 347.

8. (May, 1840.) Where a statute provides that an executor or administrator, if the estate be insolvent, may institute suit before a Probate Court, and, by giving notice, compel the creditors to exhibit their claims to be adjudged and paid *pro rata*, and that no suit shall afterwards be brought against the executor or administrator unless the plaintiff allege that such executor or administrator has been guilty of fraud, negligence, or waste, such allegation, in a subsequent suit, must be contained in plaintiff's declaration. *Walker v. Johnson*, 2 McLean, 92.

9. (Oct., 1842.) Where the plaintiff seeks to make the directors [of a banking association, under the act of Michigan approved March 15, 1837] liable for excess of loans, &c., the declaration must aver the amount of such excess. *White v. How*, 3 McLean, 111.

10. (June, 1851.) An action for false imprisonment is trespass. And this is the case whether the imprisonment be charged under color of process or without.

In this action matters of aggravation may be proved without being stated in the declaration. *Stanton v. Seymour*, 5 McLean, 267.

11. (May, 1855.) An action being brought against the defendant, charging him with an abuse of his powers as agent of the plaintiff, it is essential that [in the declaration] he should be

alleged to have acted as agent of the company. *Ætna Insurance Co. v. Sabine*, 6 McLean, 393.

12. (Oct., 1863.) Death by negligence. Under the statute of Illinois of Feb. 12, 1853, it is not necessary that the declaration should contain a special averment showing the manner in which the next of kin have sustained pecuniary loss. *Barron v. Railroad Co.*, 1 Biss. 412.

13. (Nov., 1867.) There are two classes of injuries on which the action on the case lies, — *first*, when there has been no contract, and a tort is unaccompanied by force, and is followed by a consequential injury; *second*, where a contract, express or implied, exists out of which a common-law duty arises, and the party on whom that duty devolves is guilty of malfeasance or non-feasance in regard to it. *Emigh v. Railroad Co.*, 4 Biss. 114.

14. When a railroad company engages to carry a passenger, and, after taking him on the train, wrongfully puts him off, the action of trespass on the case will lie. *Ib.*

15. (1871.) In an action against a city for an accident caused to the plaintiff by reason of a dangerous excavation in one of its public and frequented streets, the character of the excavation and of the street, as described in the declaration, and the express allegation of carelessness on the part of the city in respect thereto, were held on demurrer to show a *prima facie* liability, without a distinct allegation that the city had notice of the defect in the street which caused the injury. *Serrot v. Omaha City*, 1 Dill. 312.

16. (Jan., 1874.) The complaint alleged that the defendants, being directors of the O. S. N. Co., by their false and fraudulent acts and representations, depreciated the market value of the stock of said company, and the plaintiff, relying upon the good faith of the defendants, was induced to sell his stock in said company below its real value, to his damage. *Held*, on demurrer, that there was a failure to connect the alleged cause and effect by proper averment; that it should have been stated that the plaintiff was thereby induced to sell his stock, &c. *Weeks v. Ladd*, 2 Sawyer, 520.

Profert.

1. (Feb., 1805.) In a bill in equity by executors it is not necessary to make *profert* of their letters testamentary. *Telfair v. Stead*, 2 Cranch, 416.

2. (Feb., 1805.) Upon the death of the plaintiff and the appearance of his executor, the defendant is not entitled to a continuance. But he may insist on the production of the letters testamentary before the executor shall be permitted to prosecute. *Wilson v. Codman*, 3 Cranch, 193.

3. (Feb., 1817.) No *profert* of a deed is necessary where it is stated only as inducement, and where the plaintiff is neither party nor privy to it. *Duvall v. Craig*, 2 Wheat. 61.

4. (Feb., 1823.) A general *profert* of letters testamentary is sufficient; and if the defendant would object to their insufficiency, he must crave oyer; or, if it be alleged that the plaintiffs are not executors, the objection must be taken by plea in abatement. *Childress v. Emory*, 8 Wheat. 642.

5. (Jan., 1828.) In an action upon a judgment recovered in favor of an administrator, the plaintiff is not bound to make a *profert* of the letters of administration. That it is not necessary in actions upon such judgments that the plaintiff name himself as administrator follows from his not being bound to make *profert* of the letters of administration; and when he does so name himself, it may be rejected as surplusage. *Biddle v. Wilkins*, 1 Pet. 686.

6. (Jan., 1844.) The necessity of a *profert* of letters of administration depends upon the local laws of a state. *Matheson v. Grant*, 2 How. 264.

Oyer.

1. (Feb., 1809.) The want of oyer of the condition of a bond in plea of performance is fatal. *United States v. Arthur*, 5 Cranch, 257.

2. (Feb., 1823.) Oyer is not demandable of a record, nor, in an action upon a bond for performance of covenants in another deed, can oyer of such deed be craved; for the defendant, and not the plaintiff, must show it, with a *profert* of it, or an excuse for the omission. *Sneed v. Wister*, 8 Wheat. 691.

3. If oyer be improperly demanded, the defect is aided on a general demurrer; but it is fatal on the plea where it is set down as a cause of demurrer. *Ib.*

4. (Oct., 1814.) Oyer of the record is prayed and has been allowed by the parties without objection. But, as this judgment

is a record of another court, in strictness no such oyer is demandable. *Hatch v. White*, 2 Gall. 153.

5. (Oct., 1865.) If, in his declaration, a plaintiff makes *profert* of the bond declared on, and also a collateral agreement necessary to establish his right to recover on the bond, the defendant may crave oyer of the bond and the collateral agreement. *Hammer v. Klein*, 1 Bond, 590.

6. As the legal effect of the *profert* of the papers, they are presumed to be in court, and the opposing party has a right to know their contents, and oyer will be granted on his application. *Ib.*

7. The right of oyer, in a proper case, is a part of the common-law system of special pleading, which, in a modified form, has obtained in this court from its first organization. *Ib.*

8. (Nov., 1849.) Oyer is not demandable of letters-patent. *Smith v. Ely*, 5 McLean, 76.

Pleas. Generally.

1. (Dec., 1801.) After the first term next following an office judgment, in Virginia, it is a matter of mere discretion in the court whether they will admit a special plea to be filed to set aside that judgment. *Resler v. Shehee*, 1 Cranch, 110.

2. (Jan., 1828.) After the filing of a new count to a declaration, the defendant, who to the former counts had pleaded the general issue, or any particular plea, may withdraw the same, and plead anew either the general issue, or any further or other pleas which his case may require; but he may, if he pleases, abide by his plea, already pleaded, and waive his right of pleading, *de novo*. The failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purports to go to the whole action, it is deemed sufficient to cover the whole declaration, and puts the plaintiff to the proof of his case, in the new as well as in the old counts. *Wright v. Hollingsworth*, 1 Pet. 165.

3. (Jan., 1843.) A plea which has on the face of it two intendments ought to be construed most strongly against the party who pleads it. *United States v. Linn*, 1 How. 104.

4. *Quære*: Whether a plea which sets up new matter and concludes "to the country" is good. *Ib.*

5. (Dec., 1861.) A defendant can object to a non-joinder of

plaintiffs, not only by demurrer, but under the plea of the general issue, or on motion to arrest the judgment. *Farni v. Tesson*, 1 Black, 309.

6. (Dec., 1869.) One plea in bar is not waived by the existence of another plea in bar, though the two may be inconsistent, in their averments, with each other. The remedy of the plaintiff in such a case is not by demurrer, but by motion to strike out one of the pleas, or to compel the defendant to elect by which he will abide. *Noonan v. Bradley*, 9 Wall. 394.

7. (Dec., 1870.) Where a plea is erroneously overruled on demurrer, and issue is joined on another plea, under which the same defense might be made, the judgment will not be disturbed after verdict. *Railroad Co. v. Bank*, 12 Wall. 226.

8. (Oct., 1876.) A plea is bad which sets up that the controller has decided to pay a large amount of claims for which the bank is not responsible, and that, aside from these claims, there are means enough to meet the just liabilities of the bank. *Casey v. Galli*, 4 Otto, 674.

9. (Oct., 1860.) A plea which sets forth proceedings in a former suit and a judgment in favor of the tenants, with *profert* of the record, and also states that the demandant, subsequent to the rendition of the judgment, made application to the court to amend the record by entering judgment for the tenants as upon a nonsuit, which application the court heard and refused, is not double; and that part of the plea which states the application, being entirely immaterial, and not in any possible view affecting the question whether the judgment was or was not a bar (the record being wholly unaffected by the application), may be rejected as surplusage. *Derby v. Jacques*, 1 Cliff. 425.

10. (Jan., 1858.) When a suit in equity and a suit at law are pending between the same parties, for the same matter, one cannot be pleaded in abatement or in bar of the other; but the court of equity will sometimes order a stay of proceedings in one until the other is determined. *Graham v. Meyer*, 4 Blatchf. 129.

11. In this case, the defendant in the suit at law was not a party to the suit in equity, both being in this court; and this court denied a motion made by the defendant in the suit at law, to compel the plaintiff to elect which suit to pursue. *Ib.*

12. (April, 1872.) A plea without a conclusion is no plea. *Wilkinson v. Pomeroy*, 9 Blatchf. 513.

13. (Oct., 1817.) A plea which states matters that occurred subsequent to the institution of the suit is bad on demurrer. *Lockington v. Smith*, Pet. C. C. 466.

14. (Oct., 1806.) If the defendant has put in several pleas, he may withdraw one of them, without leave, at any time. *Vuyton v. Brenell*, 1 Wash. 467.¹

15. (Oct., 1808.) The cause had been at issue for three terms, and the defendant asked leave to file a new plea, the effect of which would be to oblige the plaintiff to suffer a nonsuit. The defendant, before the suit was brought, refused to show his lease to the plaintiff, when by so doing he would have prevented the institution of the suit. The court refused to permit the defendant to enter the plea but upon his paying the whole costs of the suit. *Anonymous*, 2 Wash. 270.

16. (Oct., 1827.) A plea which professes to be in bar of the whole demand, and yet is so only to a part, is bad on special demurrer. *Postmaster-General v. Reeder*, 4 Wash. 678.

17. If the defendant plead in bar a matter which is no defense at all, and it be found for him, still he cannot have judgment; but the court will give judgment for the plaintiff, *non obstante veredicto*, provided the defect in the plea is not in the form but in the matter of it. If it be in the form, or can be made better by other pleadings, a *repleader* will be awarded. The rule is the same if the facts stated in a demurrer to evidence maintain such a plea. *Id.*

18. (April, 1849.) A defendant will not be allowed as a matter of course to put in new pleas in this court as in state courts, on the trial of a case. The court speaks of the practice of so doing as vexatious, and one which will be allowed only where a good reason is shown for it, and then, generally speaking, only upon terms. *Childs v. Lenig*, 1 Wall. Jr. 305.

19. (May, 1813.) As to the extent of the rule, that where there are several pleas the legal inferences from the averments contained in one plea, have no influence in deciding on the averments of another plea, see the following opinion. *Pegram v. United States*, 1 Brock. 261.

20. (July, 1877.) A special plea of imprisonment is not

¹ Foot-note.

valid in a civil action. *United States v. Ottman*, 1 Hughes, 313.

21. (May, 1875.) The act of the law, as well as the act of God, can always be pleaded in a court of justice, as an excuse for performing or not performing any given act. *Smith & Co. v. Com'rs of Tallapoosa County*, 2 Woods, 596.

22. (Nov., 1876.) Under the jurisprudence of Louisiana, an exception to the petition of a plaintiff who sues as administrator, to the effect that the plaintiff is not administrator, must be pleaded in *limine litis*. It cannot be pleaded after judgment by default, or after the filing of a defense to the merits. *Barras v. Bidwell*, 3 Woods, 5.

23. Such an exception cannot be embodied in the answer, and by the rule of the court it must be verified by affidavit. *Ib.*

24. The same rules apply to the exception of *lis pendens*. *Ib.*

25. It is a good ground of exception to a claim in reconvention that it has been substantially adjudicated in another suit between the same parties in another state, where it was pleaded as a counterclaim. *Ib.*

26. The fact that the claim in reconvention is somewhat broader than the counterclaim, though founded on the same contract, will not relieve it from the exception. The whole might and should have been litigated and decided in the issue raised on the counterclaim. *Ib.*

27. A claim in reconvention should be pleaded with the same precision and detail as an original cause of action. *Ib.*

28. (April, 1859.) A plea in bar is bad, unless it goes to the whole merits of the case, and denies that the plaintiff has any cause of action. Such plea must deny, in an action of tort, as well as upon contract, either that the plaintiffs ever had the cause of action complained of, or if it admits that they once had, insist that it no longer exists. *King v. American Transportation Co.*, 1 Flipp. 2.

29. (May, 1838.) If two pleas are filed substantially the same, the court, on motion, will order the last one to be stricken out, as improperly incumbering the record. *Varnum, Fuller, & Co. v. Campbell*, 1 McLean, 313.

30. (Dec., 1838.) The plea to the declaration not having been filed within the rule, a default was entered; and a motion was made by Mr. Powers to open the default and for leave to file

a plea. [The motion was granted.] *Kemball v. Stewart*, 1 McLean, 332.

31. (June, 1840.) A release, the statute of limitations, or payment may be pleaded. *Jacquette v. Hugunon*, 2 McLean, 129.

32. (Oct., 1840.) A plea is bad which states facts that amount only to the general issue. *Halsted v. Lyon*, 2 McLean, 226.

33. It is bad if it set up two distinct matters of defense either of which is sufficient to defeat the plaintiff's action. *Ib.*

34. So, a plea is bad which sets up matters in defense, and neither denies nor admits and avoids the plaintiff's allegation. It should give color to the plaintiff's right. *Ib.*

35. (Nov., 1840.) Where an amended declaration has been taken out of the clerk's office by the plaintiff, and returned at the first of the term, the court will not enter a rule for a plea *instanter*. *Walker v. Johnson*, 2 McLean, 255.

36. (June, 1841.) Where it appears from the record that process was served on the defendant, or that he appeared to the suit, the fact cannot be denied by plea. The facts on the record necessary to give jurisdiction are material, and cannot be controverted. *Lincoln v. Tower*, 2 McLean, 473.

37. The plea may show in what manner, whether by personal service or by attachment, notice is given, as this does not contradict the record, but limits its operation. *Ib.*

38. (June, 1842.) A plea cannot contradict the record. *Hall v. Singer*, 3 McLean, 17.

39. (Oct., 1843.) A defendant may waive a defect in a declaration by pleading; and if an issue be taken on the facts of the plea by the replication, the case must turn upon the issue so made. *Bank of Illinois v. Brady*, 3 McLean, 268.

40. (Dec., 1843.) A plea which does not traverse the facts averred in the declaration, but sets up new matter in defense, admits the case made in the declaration. *Greathouse v. Dunlap*, 3 McLean, 303.

41. (June, 1845.) A plea which argumentatively denies a fact averred in the declaration is demurrable. The traverse must be direct. *Mower & Stevens v. Burdick*, 4 McLean, 7.

42. (June, 1846.) Where from the record it appears that the defendant appeared in the action, that fact cannot be denied by plea or otherwise. As well might there be a denial of a judgment. *Thompson v. Emmert*, 4 McLean, 96.

43. (May, 1849.) The option to file the general issue and give notice does not take away the right to set up the special matter in a plea. *Phillips v. Combstock*, 4 McLean, 525.

44. (May, 1849.) If a plea answer only a part of the count in the declaration it is demurrable. *Culbertson v. Wabash Navigation Co.*, 4 McLean, 544.

45. (Nov., 1849.) A plea in bar must show that the plaintiff has no right to recover. If the facts of the plea may be admitted, and yet the action may be maintained, the plea is bad on demurrer. *Smith v. Ely*, 5 McLean, 76.

46. (June, 1851.) A plea must be single. It must rest the defense on a single point. *Stanton v. Seymour*, 5 McLean, 267.

47. (May, 1855.) A plea which states facts in bar to the plaintiff's demand is not good if the facts so stated do not constitute a bar. *Curtis v. Central Railway*, 6 McLean, 401.

48. A special plea which amounts to the general issue is demurrable. *Ib.*

49. (Nov., 1870.) Where the declaration is special, stating facts and circumstances, a plea setting up the same matters is bad. They can be given in evidence under the general issue. *Van Avery v. Phoenix Ins. Co.*, 5 Biss. 193.

50. (Jan., 1880.) Under the rules of pleading established by the State of Missouri, as modified by the act of 1875, affirmative matters of defense cannot be set up under a general denial. *Mack v. Lancashire Ins. Co.*, 1 McCrary, 20.

Plea. Sworn.

1. (Feb., 1826.) The general rule of law requiring proof of the title of the holders of a note, may be modified by a rule of court, dispensing with proof of the execution of the note, unless the party shall annex to his plea an affidavit that the note was not executed by him. *Mills v. Bank of United States*, 11 Wheat. 431.

2. (Oct., 1874.) Where, as in Alabama, a statute enacts that the execution of a written instrument cannot be questioned, unless the defendant, by a sworn plea, deny it, a county sued in assumpsit, with a plea of general issue, on instruments alleged to be its bonds issued to a railroad, cannot object that there was no evidence that the seal on the bonds was the proper seal. *Chambers County v. Clews*, 21 Wall. 317.

3. (May, 1878.) Under article 1442, Paschal's Digest of the Laws of Texas, where a contract alleged to have been made by a city was executed by its mayor, the plea of *non est factum* need not be sworn to by the mayor. In such a case, where the act of the mayor is questioned, the plea is properly sworn to by members of the common council, and an affidavit made by them to the best of their knowledge and belief is sufficient. *Hitchcock v. City of Galveston*, 3 Woods, 287.

4. (May, 1839.) Under the statute of Indiana which requires a plea that denies the execution of the instrument on which the action is brought to be sworn to, if the plea be filed without oath it admits the instrument, but is good for all other legitimate purposes. *McClintick v. Johnston*, 1 McLean, 414.

5. (May, 1840.) The general issue, which denies the execution of the instrument, must be sworn to, under the statute of Indiana, which is adopted as a rule of practice in this court. *McClintick v. Cummins*, 2 McLean, 98.

6. (Oct., 1840.) By the rules of the court [Michigan], a plea which denies the instrument on which the action is founded, or the indorsement of it, must be sworn to. *Thomas v. Clark & Cole*, 2 McLean, 194.

7. If filed without affidavit, the general issue may be good for some purposes, but the note and the indorsement, under such plea, are admitted. *Ib.*

8. And this admission is, that the signature on the note is as averred in the declaration. *Ib.*

9. (June, 1853.) Under a rule of court, if the signature of the parties to the instrument on which the action is brought is denied by plea, the plea must be sworn to, or the signature is admitted. *Benedict v. Maynard & Morgan*, 6 McLean, 21.

10. A motion to make the affidavit when the cause is called for trial refused. *Ib.*

11. The affidavit should be made at the time the plea is filed. *Ib.*

Plea to the Jurisdiction.

1. (Oct., 1880.) Where a party, pursuant to leave, files a plea to the jurisdiction of the court, his former plea to the merits is thereby withdrawn. *Kern v. Huidekoper*, 13 Otto, 485.

2. (Oct., 1847.) A plea to the jurisdiction, on the ground

that a demand has been colorably assigned, in order to evade a discharge under the insolvent law, is not to be treated as dilatory and captious, like some pleas in abatement. *Wallace v. Clark*, 3 Woodb. & M. 359.

3. For good reasons and on proper terms, the rules made by this court may be varied or dispensed with, so as to allow a longer time to file such pleas. *Id.*

4. It may be otherwise with rules made for this tribunal by the Supreme Court, or any made by statutes for any court. *Id.*

5. (April, 1873.) A corporation does not waive an objection to the jurisdiction of the court over it by appearing and pleading, by an attorney, to the jurisdiction of the court. *Decker v. New York Belting and Packing Co.*, 11 Blatchf. 76.

6. (Jan., 1811.) Action by Craig, a citizen of Kentucky, against J. P., a citizen of New Orleans, and Cummings, a citizen of Pennsylvania, upon whom only the process was served, and *non est inventus* returned by the marshal as to J. P. Cummings entered a plea to the jurisdiction, stating that J. P. was not a citizen of Pennsylvania, but was a citizen of New Orleans; to which there was a general demurrer by the plaintiff.

By the law and practice of Pennsylvania, if the sheriff return *non est inventus* as to one defendant, and service of the writ on the other, the plaintiff may proceed against the latter on a joint contract, stating in the declaration the return of the writ.

The defendant who has been served with process cannot avail himself of the want of jurisdiction in the court as to a person who is severed from him, and is no longer to be considered a defendant in the case. *Craig v. Cummings*, 2 Wash. 505.

7. (June, 1849.) The common-law order of pleading is observed in this court. *Evans v. Davenport*, 4 McLean, 574.

8. A plea to the jurisdiction must be first pleaded. *Id.*

9. (July, 1856.) Defendants cannot, in a general answer, avail themselves of an objection to the jurisdiction of the court, on the ground that the title of the plaintiff is merely colorable. *Boyreau v. Campbell*, McAll. 119.

10. (Jan., 1858.) Where no want of jurisdiction is patent on the record, the proper mode of availing of such defect is by plea. *Fremont v. Merced Mining Co.*, McAll. 267.

11. (Dec., 1880.) Plea to the jurisdiction,—beginning and conclusion. *Leonard v. Grant*, 6 Sawyer, 603.

Plea to Jurisdiction in Abatement. Citizenship.

1. (March, 1824.) A plea to the jurisdiction of the Circuit Court must show that the parties were citizens of the same state at the time the action was brought, and not merely at the time of the plea pleaded. The jurisdiction depends upon the state of things at the time of the action brought; and after it is once vested, it cannot be ousted by a subsequent change of residence of either of the parties. *Mollan v. Torrance*, 9 Wheat. 537.

2. (Jan., 1828.) A question of citizenship of a party to a cause cannot constitute a part of the issue on the merits, and must be brought forward by a proper plea in abatement, in an earlier stage of the cause than the trial on the merits. *D'Wolf v. Rabaud*, 1 Pet. 476.

3. (May, 1801.) Upon a motion to discharge upon common bail, the court will not decide whether the plaintiff and defendant be co-citizens, if the question be attended with doubts of law or fact, but will put the defendant to his plea in abatement. *Knox v. Greenleaf*, Wall. C. C. 108.¹

4. (Oct., 1824.) After a trial on the merits, and a verdict or judgment given, the defendant is estopped to controvert the fact of citizenship, if it be laid in the declaration. *Bobyshall v. Oppenheimer*, 4 Wash. 482.

5. To a suit by the assignees on the bail-bond, the defendant may plead that the principal was not a citizen of another state, as laid in the original declaration, for the purpose of objecting to the jurisdiction. *Id.*

6. The suit on the bail-bond is but an incident to the original suit, and it is not necessary to state the defendants to be citizens of a different state from that of the plaintiff. *Id.*

7. (June, 1847.) The declaration alleges one of the defendants to be a citizen of the state of Michigan [where the suit was brought], and the other to be a citizen of the State of New York.

The defendant Bennet, who is averred to be a citizen of Michigan, and who is served with process, pleads to the jurisdiction of the court, setting forth that the plaintiffs and defendant Ford are citizens of the same state. [Demurrer to the plea was sustained.] *Doremus & Nixon v. Bennet & Ford*, 4 McLean, 224.

8. (June, 1849.) A person may reside in one state and be a

¹ Second edition.

citizen in another. An averment in a plea of residence is not sufficient. *Evans v. Davenport*, 4 McLean, 574.

9. (April, 1840.) Where a demurrer was sustained to a declaration, on account of a failure to show a case within the jurisdiction of the court, and the declaration was afterwards so amended as to cure that defect, it became substantially a new suit, and the defendant may interpose a plea to the jurisdiction of the court, averring that both parties are aliens. *Donaldson v. Hazen*, Hempst. 423.

10. (April, 1867.) In an action *ex delicto*, a plea in abatement by one defendant, to the effect that the court has not jurisdiction of his co-defendant, is bad on demurrer. Such objection is personal, and cannot be made by one defendant for another. *Hinckley v. Byrne*, Deady, 224.

11. An action of ejectment against several defendants is in effect a separate action against each of them, and an objection to the jurisdiction of the court, on account of the *status* of a particular defendant, can only be taken by such defendant for himself. *Ib.*

12. An allegation in a plea in abatement, that all the defendants in an action are not citizens of California, is bad on demurrer for uncertainty; the plea should state which of such defendants are not such citizens. *Ib.*

13. (April, 1876.) If a defendant wishes to contest the citizenship of the parties to an action in the national courts, he must do so by plea in abatement; and such a plea, if joined to one to the merits, may be stricken out, but is not liable to a demurrer. *Wythe v. Myers*, 3 Sawyer, 596.

Plea in Abatement. Former Suit pending.

1. (Dec., 1850.) The principle is well settled, that where two or more tribunals have a concurrent jurisdiction over the same subject-matter and the parties, a suit commenced in any one of them may be pleaded in abatement to an action for the same cause in any other. *Shelby v. Bacon*, 10 How. 56.

2. (Dec., 1868.) A question, which is pending in one court of competent jurisdiction, cannot be raised and agitated in another, by adding a new party and raising a new question as to him, along with the old one as to the former party. The old question is in the hands of the court first possessed of it, and is to

be decided by such court. The new one should be by suit in any proper court, against the new party. *Memphis City v. Dean*, 8 Wall. 64.

3. (Oct., 1875.) The exception that a suit in equity was pending, in which the plaintiffs asked for a decree for the same money, was no ground for abatement of this action at law, as the result of the action may be necessary for the perfecting of a decree in that suit. *Kittredge v. Race*, 2 Otto, 116.

4. (Oct., 1878.) That the pendency of a suit in a state court does not abate a suit upon the same cause of action, in a court of the United States. *Gordon v. Gilfoil*, 9 Otto, 169.

5. (May, 1838.) It is not a good plea in abatement, to a suit in the Circuit Court of the United States, for the recovery of land, that another action, in which the present defendant is plaintiff, and the present plaintiff is defendant, is pending in the state court, for the recovery of the same land. *Wadleigh v. Veazie*, 3 Sumn. 165.

6. To sustain the plea of the pendency of another action, it must be generally shown that the two actions are by the same plaintiff, against the same defendant, and founded on the same cause of action. *Ib.*

7. (Nov., 1853.) The pendency of a prior suit in a state court is not a good plea in abatement, to a suit *in personam*, in this court. *White v. Whitman*, 1 Curt. C. C. 494.

8. Such a plea must show jurisdiction of the former suit, if pending in a court not under the same sovereignty. *Ib.*

9. The absence of an affidavit, verifying the facts alleged in the plea, is fatal. *Ib.*

10. (Nov., 1855.) *Lis pendens* in a foreign country is not a good plea in abatement. *Lyman v. Brown*, 2 Curt. C. C. 559.

11. (Nov., 1854.) To an action brought by A., to recover for goods sold, B. pleaded that, before the bringing of the action, B. had sued A. in a state court of New York, to recover money, and, in that suit, had attached, under the state law, the debt sued for by A.; that A. had removed into this court the suit in the state court; that it was still pending; and that the attachment still held the debt. *Held*, on demurrer to the plea, that it was bad. *New England Screw Co. v. Bliven*, 3 Blatchf. 240.

12. (July, 1843.) The pendency of a suit between the same parties, and respecting the same subject-matter, in another state,

may be pleaded in abatement in the courts of the United States. *Ex parte Balch*, 3 McLean, 221.

13. But to make such plea effectual, it must show that the court where the suit is pending has jurisdiction. *Ib.*

14. Certain things are required to give jurisdiction to a proceeding in bankruptcy, and all these must appear in the plea. *Ib.*

15. (June, 1847.) The pendency of a suit in the state court may be pleaded in abatement, to a suit subsequently brought by the same parties, and for the same cause, in the Circuit Court of the United States. *Earl v. Raymond*, 4 McLean, 233.

16. One of joint promisors filed the plea in abatement; the other suffered a default. A motion being made for judgment on the default, the court refused the motion, on the ground that the plea showed there could be no procedure against him. *Ib.*

17. (Sept., 1857.) Certificate of counsel that, in his opinion, the plea is well founded, need not accompany a plea in abatement in the federal court. *Nelson v. Foster*, 5 Biss. 44.

18. A plea of another action pending, in the usual form, that the former suit was, at the time of the commencement of this suit, and still is, pending, is sufficient without alleging that the former suit was not discontinued before the plea was filed. *Ib.*

19. The pendency of a suit in a state court is a good plea in abatement in the federal court. *Ib.*

20. (April, 1874.) The pendency of a suit in a court of general jurisdiction in another state, in which property sufficient to satisfy the demand had been attached, is a bar to a second suit in this court. *Lawrence v. Remington*, 6 Biss. 44.

21. The rule in some courts, that the pendency of an action in a foreign jurisdiction is not pleadable in abatement, does not apply where the plaintiff has secured his debt by attachment in such action. *Ib.*

22. (1876.) A plea in abatement of a cause in the federal court, that another suit is pending in a state court, is not good where the parties to the two suits are not the same. *Brooks & Hardy v. Mills County*, 4 Dill. 524.

Plea in Abatement. Various Causes.

1. (Feb., 1806.) *Quære*: Whether a deputy marshal can plead in abatement, that the *capias* was not served on him by a disinterested person. *Knox v. Summers*, 3 Cranch, 496.

2. (Feb., 1814.) If there are several tenants claiming several parcels of land, by distinct titles, they cannot lawfully be joined in one writ; and if they are, they may plead in abatement of the writ. *Green v. Lister*, 8 Cranch, 230.

3. If tenants claiming different parcels of land by distinct titles omit to plead that matter in abatement, and join the mise, it is an admission that they are joint tenants of the whole. *Id.*

4. (Feb., 1826.) Marriage of one of the plaintiffs pending the suit does not of itself abate the suit. The objection could only be made available by a plea in abatement. *Chirac v. Reinicker*, 11 Wheat. 303.

5. (Jan., 1836.) Generally speaking, all joint obligors, and other persons bound by covenants, contract, or *quasi* contract, ought to be made parties to the suit; and the plaintiff may be compelled to join them all by a plea in abatement for the non-joinder. But such an objection can only be taken advantage of by a plea in abatement; for if one party only is sued, it is not matter in bar of the suit, or in arrest of judgment, upon the finding of the jury, or of variance in evidence upon the trial. But the same doctrine does not appear to have been acted upon, to the full extent, in cases of recognizance and judgments, and other matters of record, such as bonds to the crown. If in cases of this sort it appears by the declaration, or other pleadings, that there is another joint debtor who is not sued, although it is not averred that he is living, the objection need not be pleaded in abatement, but it may be taken advantage of upon demurrer or in arrest of judgment. *Gilman v. Rives*, 10 Pet. 298.

6. (Jan., 1840.) The marshal, on his return to a *scire facias* to revive a judgment in ejectment, stated that two of the defendants were dead. This return does not become matter of record, like the fact of service of the writ stated in the return, and cannot be taken advantage of by demurrer. A plea in abatement was the proper method of taking advantage of the decease of those of the defendants who were deceased. On this plea the plaintiff could have taken issue, and have had the facts ascertained by a jury. *Walden v. Craig*, 14 Pet. 147.

7. (Dec., 1855.) If the judgment was recovered in Ohio, against the company, by an erroneous name, but the suit upon the judgment was brought in Indiana, against the company, using its chartered name correctly, accompanied by an averment that it

was the same company, this mistake is no ground of error; it could only be taken advantage of by a plea in abatement, in the suit in which the first judgment was recovered. *Lafayette Ins. Co. v. French*, 18 How. 404.

8. (Dec., 1869.) It would appear that the objection that as to the causes of action stated in the declaration the plaintiff is not and never has been administrator of the effects of the deceased may be taken by plea in abatement. *Noonan v. Bradley*, 9 Wall. 394.

9. (Oct., 1827.) Replevin will not lie by one joint owner. But the objection can only be taken by plea in abatement, where he sues for the whole. If he sues for a *moiety*, the court will abate the writ *ex officio*. *De Wolf v. Harris*, 4 Mason, 515.

10. (May, 1801.) On a plea in abatement, if the jury find against the plea, they ought to assess the damages on the plaintiff's declaration; if this is omitted, a *venire de novo* must be awarded. *Hollingsworth v. Duane*, Wall. C. C. 51.¹

11. (July, 1873.) When a defendant does not reside in the state where the suit is brought, but is served with process there, he may plead the matter in abatement. If he does not plead it in abatement, he cannot set it up afterwards. *Searles v. Railroad Co.*, 2 Woods, 621.

12. (May, 1839.) A plea that the note had been assigned should be supported by some proof that the right was in the assignee. *Conant v. Wills & Bradley*, 1 McLean, 427.

13. (June, 1853.) A plea in abatement is not a waiver of process. The plea may be abandoned, and a motion to quash the writ for a defective service may be substituted. *Halsey v. Hurd*, 6 McLean, 14.

14. (1870.) Under certain provisions of a fire insurance policy, the refusal of the assured to submit to an examination on oath, or to answer material questions respecting the loss, was considered not to work a forfeiture of the policy, but only to cause the loss not to be payable until this was done; and such refusal should be pleaded in abatement, and separately from the defenses in bar. *Weide v. Germania Ins. Co.*, 1 Dill. 441.

15. (March, 1880.) All matters which go to challenge the jurisdiction of the court, or the capacity of the plaintiff to sue, should be presented by plea in abatement, in advance of hearing on the merits. *Gause v. City of Clarksville*, 1 McCrary, 79.

¹ Second edition.

16. (1880.) The Arkansas code abolishes pleas in abatement, and in that state there is no difference in the method of pleading matter in abatement and matter in bar; and where a want of jurisdiction over the person is not disclosed upon the face of the complaint, the objection may be taken by answer. *Ehrman v. Teutonia Ins. Co.*, 1 McCrary, 123.

17. Matter in abatement must be pleaded with exactness, and ought to be certain to every intent. *Ib.*

18. (March, 1877.) Under the Oregon Civil Code (sec. 91), a plaintiff in an action to recover the possession of a particular tract of land, is not entitled to join parties as defendants who occupy in severalty distinct parcels of said tract; and if he does so join them, and the fact does not appear upon the face of the complaint, the defendants may plead it in abatement of the action. *Gibbons v. Martin*, 4 Sawyer, 206.

19. The rule in such cases at common law. *Ib.*

20. *Seemle*, if the defendants are mere trespassers or squatters, without color of right or definite claims to distinct parcels or established and visible boundaries, they may be joined in one action. *Ib.*

21. (May, 1878.) The rule of the common law, that an action abated by the termination or transfer of the plaintiff's interest therein, *pendente lite*, is abrogated by sec. 37 of the Oregon Civil Code, which declares that no action shall abate for any such cause; and sec. 27 of said code, which provides that "every action shall be prosecuted in the name of the real party in interest," must, in connection with said sec. 37, be taken to mean that every action shall be commenced "in the name of the real party in interest." *Elliot v. Teal*, 5 Sawyer, 188.

Plea. Alien Enemy.

1. (Oct., 1814.) Of the nature and effect of a plea of alien enemy. There is no legal difference as to the plea of alien enemy between a corporation and an individual. *The Society, &c. v. Wheeler*, 2 Gall. 104.

2. (Oct., 1865.) In a plea of alien enemy, by which it is sought to avoid the suit altogether, it is necessary to aver that such was the *status* and character of the plaintiff at the commencement of the suit. *Elgee's Adm'r v. Lovell*, Woolw. 102.

3. If the disability arise afterwards, the further prosecution of the suit is suspended merely until peace is restored. *Ib.*

4. In an action on contract, the plea is good in bar to show that the contract was made in time of war with a public enemy, by a party in allegiance to the government in whose court the suit is brought. *Ib.*

Pleas in Bar. In Assumpsit.

1. (April, 1797.) The cause (which was *indebitatus assumpsit*) came on for trial before CHASE and PETERS, Justices, at the April term, 1798, when, after the opening was commenced by Rawle, for the plaintiff, it was discovered that the plea of *non assumpsit* was entered *in short*, and that the Statute of Limitations had also been pleaded; though the jury were only sworn to try the *issue*, and not the *issues*, joined between the parties.

CHASE, Justice. The whole proceeding is to my mind unintelligible and irregular. There is only one of the parties to the contract, and only one of the defendants named in the writ, before the court; and no process of outlawry has been prosecuted against the others. How shall we proceed to give judgment? Again: To what is the plea of *non assumpsit* to be applied? Is it that the appearing defendant did not assume himself, or that he did not jointly assume with the other defendants? And how comes the plea of the Statute of Limitations to be added, without the leave of the court? But the counsel will have time to reflect upon these difficulties. For the jury are not sworn even in this irregular state of the record to try the issues between the parties, and therefore the court, on its own authority, will direct the juror last qualified to be withdrawn.

A juror was accordingly withdrawn, and the action continued till the next term. Foot-note. *United States v. Parker*, 2 Dall. 380.

2. (Jan., 1850.) Where the obligor of a single bill was sued by an assignee, and pleaded that the bill was given for the purchase of horses, which were not as sound nor of as high a pedigree as had been represented by the seller, such a plea was admissible. *Withers v. Greene*, 9 How. 214.

3. It is not a sufficient objection to the plea that it omits a disclaimer of the contract, and a proffer to return the property.

If the defendant looked only to a mitigation of damages, he was not bound to do either, and therefore was not bound to make such an averment in the plea. *Ib.*

4. Nor is it a sufficient objection to the plea that it avers that the obligation was obtained from him by fraudulent representations, or that it concludes with a general prayer for judgment. Pleas in bar are not to receive a narrow and merely technical construction, but are to be construed according to their entire subject-matter. *Ib.*

5. In this respect there is a difference between pleas in bar and pleas in abatement. *Ib.*

6. (Dec., 1850.) The bankruptcy of the plaintiff prior to the time when he took the notes, payable to himself, was no legal defense to the action. He was one of the persons authorized to settle up the insolvent estate; and whether or not he accounted to his creditors for the proceeds was no question between him and the maker of the notes. *Randon v. Toby*, 11 How. 493.

7. (Dec., 1851.) In this case, if the plea had been before the court, it was bad, because, being a plea that the note was paid before the original judgment, it called upon the party to prove a second time what had been once settled by a judgment. The omission of the court to render a judgment upon the plea could not be assigned as error. *Morsell v. Hall*, 13 How. 212.

8. (Dec., 1871.) A plea which states that the sum due on a promissory note is a certain amount on a certain day, and avers a tender on that day of the sum due in legal-tender notes of the United States, is a good plea of tender. *Dooley v. Smith*, 13 Wall. 604.

9. In a suit on such note, an order of court made by consent that the money might be withdrawn from court, without prejudice to the validity of the tender, cannot be supposed to be the reason why the court held the plea bad on demurrer. *Ib.*

10. (Oct., 1874.) Where a declaration in assumpsit, upon bonds of a county, issued to a railroad company, alleges that the bonds were issued by the county in pursuance of an act of legislature named, and that they were purchased by the plaintiffs for value, and before any of them fell due, a plea of the general issue puts in issue the question of authority to issue, *bona fides*, and notice. *Chambers County v. Clews*, 21 Wall. 317.

11. (Oct., 1876.) The omission of indorsers on a series of notes transferred to the holder in settlement of their own note held by him, upon an agreement in writing that they should not be held liable on their indorsement, to set up the agreement as a defense to an action against them, brought by the holder on two of the notes, does not preclude them from setting up the agreement in a second action by the holder on others of the same series of notes. The judgment in the original action does not operate as an estoppel against showing the existence and validity of the agreement in the second action. *Davis v. Brown*, 4 Otto, 423.

12. (Oct., 1877.) Assumpsit by an assignee in bankruptcy of an insurance company against the holder of shares of its stock, to enforce the collection of the balance due thereon, the same not having been paid pursuant to the order of the court sitting in bankruptcy. Plea, *non assumpsit*. *Held* (1.) That the plea admits the existence of the corporation, and that the state alone can raise the question whether the corporate stock had been properly increased. *Pullman v. Upton*, 6 Otto, 328.

13. (Oct., 1877.) A defendant, sued by a national bank for moneys it loaned him, cannot set up as a bar that they exceeded in amount one-tenth part of its capital stock actually paid in. *Gold-Mining Co. v. National Bank*, 6 Otto, 640.

14. (April, 1808.) Under a plea of payment, proof of the discontinuance of the suit cannot be given in evidence; and the defendant should have availed himself of the alleged discontinuance before appearing and taking defense. *Latapee v. Pecholier*, 2 Wash. 180.

15. By the practice and laws of Pennsylvania, any evidence may be given under the plea of payment which proves that, *ex equo et bono*, the debt claimed ought not to be paid. *Ib*.

16. Under which circumstances, the court will stay proceedings of execution until the defendant shall be protected from the danger of a double payment. *Ib*.

17. (May, 1822.) The law which governs pleading in Virginia is different from that which regulates it in England. In England the courts exercise a controlling power over the defendant who seeks to plead inconsistent matters conferred by 4 & 5 Anne, ch. 16; and it is discretionary with them to receive or reject the inconsistent pleas which may be tendered. But in

Virginia the right to "plead as many several matters, whether of law or of fact, as he shall think necessary for his defense," is expressly given by statute; and the courts cannot control that right, if the pleas be offered in time. Where they are not so offered (as where the defendants permitted a writ of inquiry to be entered against them, and the term at which it might be set aside to pass away without pleading), the English doctrine then applies, and the right depends upon the favor of the court. Hence, when, in an action of assumpsit, the defendants, at the rules, pleaded both the general issue and demurred, and the plaintiffs took issue on the plea, but refused to join in demurrer, this was held to be a discontinuance, by virtue of the act of assembly, and the plaintiffs were nonsuited, though they were permitted to reinstate their cause. *Furniss v. Ellis*, 2 Brock. 14.

18. (Oct., 1869.) The material question in this case arises on the demurrer to the third special plea of the defendant, stating as a defense certain special agreements between the parties relating to the transportation of the animals, and averring a failure of the consideration on which the bills in question were drawn and accepted, by reason of the careless, negligent, and tortious manner of transporting the animals, whereby the defendant suffered damage in excess of the sum for which the bills were drawn. This plea is defective in not responding to the cause of action as set out in the declaration. *Railroad v. Thompson*, 2 Bond, 296.

19. Nothing is set forth in the plea in avoidance of the defendant's liability on his special agreement to accept and pay the bills; and, as a commercial transaction, his refusal to pay the bills, and suffering them to be protested, is a good cause of action against him by the holders. *Id.*

20. The plea is also demurrable in that, while in its structure it is a plea in bar to the action, it sets up, by way of set off, a claim to a judgment for a large amount as damages sustained by the defendant for the alleged wrongful and tortious conduct of the plaintiffs in the transportation of the animals. This subjects the plea to the objection of duplicity. *Id.*

21. If intended as a claim for unliquidated damages, it must be set forth in a separate plea. *Id.*

22. The plea is also fatally defective in its showing that the

alleged damage sustained by the defendant was for the wrongs or torts to property of which he was only interested with other parties; and is no response to the declaration setting out a breach of the defendant's separate and individual promise. *Ib.*

23. If the parties who were interested in, or owners of, the animals have sustained the damages asserted, by the wrongful or tortious acts of the plaintiffs, their remedy must be by a separate action against the plaintiffs on that basis. *Ib.*

24. The defendant cannot maintain his right to set up the defense that the plaintiffs were guilty of torts to the property of Thompson and Groom, and other parties, on the ground that he was the bailee of the property. *Ib.*

25. (May, 1838.) A plea that the bill of exchange on which the action is founded was not drawn and accepted at the place alleged constitutes no bar to the action, and is bad on demurrer. *Jones v. Heaton*, 1 McLean, 317.

26. (May, 1839.) To a plea that the note was given and the assignment made without consideration, the plaintiff should take issue on the want of consideration of the note, or of the assignment, and not on both. *McClintick v. Johnston*, 1 McLean, 414.

27. An issue must be single, though it may embrace several facts. *Ib.*

28. An issue is formed generally of an affirmation and denial, and not of two negatives. *Ib.*

29. A plea of fraud in the execution of the instrument need not state the facts which constitute the fraud. *Ib.*

30. The plea of duress, by the maker of the note, as against the assignee, is bad, unless there be an averment of notice to the assignee. *Ib.*

31. (June, 1841.) Where the action is on a promissory note, a failure of the consideration is a good defense. *Scudder v. Andrews*, 2 McLean, 464.

32. And it is immaterial whether the consideration was land or other property. *Ib.*

33. A partial failure of consideration cannot be set up as matter of defense. On this point there is a conflict in the decided cases, but the weight of authority requires a total failure of the consideration. *Ib.*

34. Where the defendants gave their note for a tract of land which belonged to the United States, and to which the plaintiff could have no title, the defendants may plead the fact to an action on the note. *Ib.*

35. (July, 1841.) A plea that the defendant, who was sued as principal, indorsed the note as guarantor and not as principal, being demurred to, it was held the plea was good. *Dibble, Pray, & Co. v. Duncan*, 2 McLean, 553.

36. The undertaking of the defendant was collateral, and he can only be made liable in the character assumed. *Ib.*

37. A special plea which amounts only to the general issue is bad. *Ib.*

38. But in the action of assumpsit there are many defenses, which may be pleaded specially or given in evidence under the general issue. *Ib.*

39. In special pleas in bar, color to the plaintiff's right must be given. *Ib.*

40. (May, 1843.) A plea that the defendant paid the note to the assignor before he had notice of the assignment cannot be sustained against the assignee. *Patterson v. Atherton*, 3 McLean, 147.

41. The plea should aver that the payment was made before the note was assigned, or before it was due. *Ib.*

42. And so where the defendant alleges he paid \$500 to the assignor before he had notice of the assignment. And the averment that the balance was paid to the plaintiff is defective, as it does not appear that the plaintiff received it as such, in discharge of the note. *Ib.*

43. (May, 1843.) Duress cannot be pleaded by a stranger. *McClintick v. Cummins*, 3 McLean, 158.

44. (May, 1843.) A plea which admits the execution of the instrument, and sets up matter in avoidance, is not objectionable as amounting to the general issue. *Thomas' Assignee v. Page*, 3 McLean, 167.

45. (June, 1843.) The Bank of Missouri, having bills to the amount of \$100,000 of the Bank of Illinois, the latter bank agreed to draw drafts on New York for the amount, and leave its bills in the hands of a third party as collateral security, and also to place \$10,000 in addition in bills, to cover damages of protest. The bills were protested, and suit was brought against the

Bank of Illinois on the protested bills. The above agreement cannot be pleaded in bar of the action. *Stickney v. Bank of Illinois*, 3 McLean, 181.

46. Nor can an agreement, should the drafts be protested, to deliver an amount of the said bills, to cover the damages, be so pleaded. *Ib.*

47. (Oct., 1843.) A plea to an action against the directors of a bank, under the Michigan act of 1837, which makes them personally liable where the bank is insolvent, &c., which avers the notes on which the action was brought were fraudulently put into circulation, is no answer to the declaration. *White v. How*, 3 McLean, 291.

48. A bank is answerable for the acts of its agent. And it is immaterial how notes get into circulation, if they come into the hands of the holder *bona fide*. *Ib.*

49. That plea is defective which, admitting its averments to be true, does not constitute a bar to the action. *Ib.*

50. (May, 1844.) Where a promissory note is made, the consideration of which is to be defeated if certain bills of exchange shall not be paid, in the hands of the assignee without notice the non-payment of the bills cannot be set up as a defense. *Thomas v. Page*, 3 McLean, 369.

51. And this principle is not affected by the statute of Indiana, which provides that the maker of the note may set up any defense against the assignee which he could make against the payee. *Ib.*

52. The agreement between the original parties would be a fraud upon an innocent assignee. *Ib.*

53. (June, 1844.) A plea to an action on a note given for the consideration of the sale of goods, which avers that the goods purchased are of no value to defendant, is not good. *Christy v. Cummins*, 3 McLean, 386.

54. (June, 1848.) To an action of assumpsit defendants pleaded *non assumpsit*, and that the note was signed by Goodwin as a partner of Walcott, in both their names, after the partnership had been dissolved. The plea was sworn to. *Held*, by the court, that the note could not be received in evidence. *Frazer v. Walcott & Goodwin*, 4 McLean, 365.

55. (May, 1869.) Failure of consideration. In this defense to a note the plea should allege distinctly and with precision the

actual consideration, and that there never was any other. *Gruninger v. Philpot*, 5 Biss. 82.

56. The plea should set up to what extent and wherein there has been a failure. *Ib.*

57. Fraudulent representations should be fully stated, with all necessary incidents of time and circumstance, and also that the party entered into the contract and gave the note relying upon such representations. *Ib.*

Plea. In Action for Breach of Promise of Marriage.

1. (April, 1872.) A plea of the general issue in an action for breach of promise of marriage may be treated as a nullity, under Rule 26 of this court, if not accompanied by the affidavit and the certificate required by that rule. *Wilkinson v. Pomeroy*, 9 Blatchf. 513.

2. A special plea, in such an action, may be treated as a nullity, under Rule 27 of this court, if not accompanied by the certificate required by that Rule. *Ib.*

3. In such an action, matter in a plea which attributes to the plaintiff habits, disposition, temper, and acts, in such wise as would warrant an action for libel against whoever should publicly make such charges by printing or writing, is irrelevant, impertinent, and scandalous, and will be stricken out on motion. *Ib.*

4. (March, 1873.) The proper plea to a count on a breach of promise of marriage is *non assumpsit*, and not, *not guilty*; and a plea of *not guilty* will be stricken out, on special demurrer, as bad. *Wilkinson v. Pomeroy*, 10 Blatchf. 524.

Plea. Counterclaim and Set-off.

1. (Oct., 1879.) A party claiming a credit which, by reason of his laches, was not presented to the accounting officers of the treasury, and disallowed in whole or in part by them, cannot set it up in an action brought by the United States against him for the recovery of a debt. *Railroad Co. v. United States*, 11 Otto, 543.

2. (March, 1876.) When a debtor had notice that his creditor A. had assigned the debt due him to B., and afterwards procured a counterclaim against the original creditor, A., — *Held*,

that he could not use such claim as a set-off in a suit brought in the name of A. for the use of B., to recover the debt assigned to B. *Whitaker v. Pope*, 2 Woods, 463.

3. (Oct., 1856.) The rejection of an account or claim against the United States, by an accounting officer of the government authorized by a special act of Congress to adjust the same on equitable principles, does not preclude the defendant, when sued, from setting up such rejected claim or account as a set-off. *United States v. Smith*, 1 Bond, 68.

4. (May, 1844.) A defendant may set up in his defense under the general issue that the plaintiff is one of a partnership, and that the firm is indebted to him in a larger sum than that which the plaintiff demands, it being a part of the same transaction. *Buckingham v. Burgess*, 3 McLean, 364.

5. (June, 1844.) Property received collaterally, and not in payment of a note, cannot be set up, in an action on the note, by way of set-off. *Thomas v. M'Connell*, 3 McLean, 381.

6. Unliquidated damages cannot be pleaded as a set-off. *Ib.*

7. Where a plea alleges that the payee of a note received another note and mortgage, to be applied to the note, it is to be construed that the proceeds of the note and mortgage are to be applied when received. *Ib.*

8. To make such a plea good, it is necessary to aver the receipt of proceeds, &c. *Ib.*

9. (June, 1846.) A set-off of notes subsequently acquired by the surety in the bond [to save harmless the creditors of a certain firm, by paying the amount due or to become due], cannot be pleaded as an offset against the creditors' demand. *Bergen v. Williams*, 4 McLean, 125.

10. Nor is a plea of *nil debet* admissible after the creditors have obtained judgment against the late firm. *Ib.*

11. (June, 1850.) An unliquidated demand cannot be offset against the government, or between individuals. *United States v. Williams*, 5 McLean, 133.

12. (Oct., 1867.) In an action by the United States on a postmaster's bond, the defendant may plead a counterclaim, if it appears from such plea that the items thereof have been duly presented to the proper department for allowance, and rejected. *United States v. Davis*, Deady, 294.

13. A plea of a counterclaim for certain extra services and

expenses incurred by a postmaster, under the act of June 22, 1854 (10 Stat. 293, 299), or the act of July 1, 1864 (13 Stat. 335), should show that the office kept by the defendant was within the act authorizing an allowance on such accounts. *Ib.*

14. (Oct., 1875.) A counterclaim is substantially a cross-action, and should contain nothing but the facts necessary to constitute it; and if any other defense is inserted therein, it may be stricken out. *Neff v. Pennoyer*, 3 Sawyer, 496.

15. To enable a defendant to maintain a counterclaim for the value of improvements made upon the premises of another, it must appear therefrom that the improvements are affixed to the freehold and still existing, and that they better the condition of the property for the ordinary purposes for which it is used; and that they were made while the defendant, or those under whom he claims, were in possession under color of title, in good faith, adversely to the claim of the plaintiff. (Oregon Civil Code, § 318). *Ib.*

16. A counterclaim not containing these allegations, but only a statement of facts tending to prove them, will be stricken out as irrelevant. *Ib.*

17. (April, 1876.) A counterclaim for permanent improvements should not be pleaded to the whole complaint, but only to so much thereof as it is an answer or defense; and it should allege the present value of said improvements, and that they better the condition of the property for the ordinary purposes for which it is used. *Wythe v. Myers*, 3 Sawyer, 595.

Plea. Usury.

1. (Dec., 1870.) A corporation cannot plead usury to a bond payable in New York. Statute law there prevents it. *Railroad Co. v. Bank*, 12 Wall. 227.

2. (Oct., 1877.) Suit by a national bank upon a bill of exchange. Defense, usury. The bank, in discounting the bill, reserved a greater amount than was allowed for interest by the law of the state where it was situated. There was no proof of the current rate of exchange. *Held*, that the bank was entitled to recover. *Wheeler v. National Bank*, 6 Otto, 268.

3. (Oct., 1878.) In Virginia, a party cannot avail himself of the defense of usury without averring and proving it; and

he is required to pay the principal of his debt. *Kesner v. Trigg*, 8 Otto, 50.

4. (Oct., 1878.) In a suit by a national bank against all the parties to a bill of exchange discounted by it, to recover the amount thereof, the assignees of the acceptor — the latter having made an assignment for the benefit of his creditors — cannot, having intervened as parties, set up by way of counterclaim or set-off that the bank, in discounting a series of bills of their assignor, the proceeds of which it used to pay other bills, knowingly took and was paid a greater rate of interest than that allowed by law. *Barnet v. National Bank*, 8 Otto, 555.

5. (May, 1876.) While the general rule is recognized by all the authorities that a stranger cannot set up usury as a defense, and that the transaction can only be impeached by the borrower or those in privity with him, the application of this doctrine has occasioned a vast amount of litigation, and the authorities are far from harmonious.

The case of *Lloyd v. Scott* (4 Pet. 205) is the later adjudication of the Supreme Court, and apparently strikes at the root of the general rule above stated. *Yardley v. New York Guaranty and Indemnity Co.*, 1 Flipp. 551.

6. (Sept., 1857.) Usury must be specially pleaded or specifically set forth in the record, and supported by evidence, or the court will not inquire into it. *Cleveland Ins. Co. v. Reed*, 1 Biss. 180.

Plea. In Debt on Judgment.

1. (April, 1794.) Action of debt upon a judgment of the Supreme Court of New Jersey. Plea, *nil debet*.

WILSON, Justice. There can be no difficulty in this case. If the plea would be bad in the courts of New Jersey, it is bad here; for, whatever doubts there might be on the words of the Constitution, the act of Congress effectually removes them; declaring in direct terms that the record shall have the same effect in this court as in the court from which it was taken. In the courts of New Jersey no such plea would be sustained; and therefore it is inadmissible in any court sitting in Pennsylvania. *Armstrong v. Carson*, 2 Dall. 302, 303.

2. (Jan., 1828.) The plaintiff, as administrator of W., had brought a suit in the District Court of the United States for the

Western District of Pennsylvania, and recovered a judgment; and upon this judgment he instituted a suit in the District Court of the United States, of the State of Mississippi, against the defendant in the original suit. The defendant pleaded, that, by the Orphans' Court of Adams County, in the State of Mississippi, where the defendant resided, he had been appointed the administrator of W., and had continued to act in that capacity. *Held*, that the debt due upon the judgment obtained in Pennsylvania by the plaintiff, as administrator of W., was due to him in his personal capacity, and it was immaterial whether the defendant was or was not administrator of W., in the State of Mississippi. That would not, in any manner, affect the rights of the plaintiff; and the plea tenders an immaterial issue, and is bad on demurrer. *Biddle v. Wilkins*, 1 Pet. 686.

3. Where the court in which judgment is rendered has not jurisdiction over the subject-matter of the suit, or where the judgment upon which suit is brought is absolutely void, this may be pleaded in bar; or may, in some cases, be given in evidence, under the general issue, in an action brought upon the judgment. *Ib.*

4. The general rule is that there can be no averment in pleading against the validity of a record, though there may be against its operation; and it is upon this ground that no matter of defense can be pleaded in such case to a suit on a judgment which existed anterior to the judgment. *Ib.*

5. (Oct., 1874.) Where suit is brought on a record which shows that service was not made on the defendant, but which shows also that an appearance was entered for him, by an attorney of the court, it is not allowable, under a plea of *nul tiel record* only, to prove that the attorney had no authority to appear. *Hill v. Mendenhall*, 21 Wall. 453.

6. Presumptively, an attorney of a court of record, who appears for a party, has authority to appear for him; and though the party for whom he has appeared, when sued on a record in which judgment has been entered against him on such attorney's appearance, may prove that the attorney had no authority to appear, yet he can do this only on a special plea, or on such plea as, under systems which do not follow the common-law system of pleading, is the equivalent of such plea. *Ib.*

7. (Oct., 1874.) Fraud cannot be pleaded to an action in

one state upon a judgment in another. *Maxwell v. Stewart*, 22 Wall. 77.

8. *Nil debet* is not a good plea to an action upon a judgment in another state. *Ib.*

9. (Oct., 1876.) It is no defense that the defendant in the original judgment has been garnished, or the judgment sold, at the instance of creditors of the plaintiff, where the sureties have not been made parties to the proceedings to appropriate such judgment. *Smith v. Gaines*, 3 Otto, 341.

10. (Oct., 1854.) There being four counts in a declaration, each founded on an alleged submission and award, a plea purporting to answer the whole action, but alleging only a revocation of one submission, and not showing which one of the four alleged, is bad on general demurrer. *Matthews v. Matthews*, 2 Curt. C. C. 105.

11. A plea to an action of debt on an award, that the referees never made any such award as is averred in the declaration, is bad, as amounting to the general issue. *Ib.*

12. (March, 1832.) Under the Constitution of the United States, and the act of Congress of 1790, the judgment of a state court has the same credit, validity, and effect in every other court in the United States which it has in the state where it was rendered; and whatever pleas would be good to a suit thereon in such state, and none other, could be pleaded in any other court in the United States. *Warren Mfg. Co. v. Etna Ins. Co.*, 2 Paine, 502.

13. It would be competent to show that the judgment was obtained by fraud. *Ib.*

14. It may be shown by proper evidence that the court rendering the judgment had not jurisdiction; and the pleadings may be so shaped as to admit such evidence. *Ib.*

15. (April, 1835.) In pleading a record, it is not indispensable that the precise words of the record shall be observed. Surplusage, or immaterial omissions in matters of substance, in pleading records, are attended with no other consequences than in other cases. But as to matters of description it is otherwise; and there the record produced must conform strictly to the plea. *Whitaker v. Bramson*, 2 Paine, 209.

16. As the plea of *nul tiel record* puts in question the identity of the record, if circumstances descriptive of the record be un-

truly stated, though it was not necessary that they should be stated at all, it will be fatal. *Ib.*

17. The party, by pleading a record with a *prout patet*, professes that issue; and it is incumbent on him to maintain it literally; and this as well where the averment has reference to particulars which need not be specifically stated upon the record, as to those which must be so stated. *Ib.*

18. (Oct., 1849.) A. filed a bill in equity against B., in the Circuit Court of the United States in Massachusetts, for the infringement of a patent; the bill was taken *pro confesso*, and a decree rendered against B. for a large amount, he not appearing in the case. Afterwards A. brought an action of debt in this court, against B., on the decree. *Held*, that A. could not recover, because it did not appear affirmatively on the face of the Massachusetts record that B. was personally served with process in that district. *Allen v. Blunt*, 1 Blatchf. 480.

19. (Sept., 1877.) M. brought an action at law, in this court, on a judgment recovered by him against O., in another court. O., by answer, set up a variety of matters which were not defenses at common law against the judgment, but which were claimed to give O. an equitable right to prevent the enforcement of the judgment. On demurrer to the answer, — *Held*, that the demurrer must be sustained. *Montejo v. Owen*, 14 Blatchf. 324.

20. Sec. 914 of the Revised Statutes of the United States does not authorize such an answer to be put in, in an action at law. *Ib.*

21. (Oct., 1815.) In an action of debt on a judgment obtained against the defendants in the Court of Common Pleas of Pennsylvania, one of the defendants pleaded that he had not been served with process, and had not appeared in the suit in which the judgment had been entered. On a demurrer to this plea, it appeared from the record of the judgment that there had been a general appearance by attorney, and that the pleadings had been entered by him for both defendants. The court overruled [sustained] the demurrer. *Field v. Gibbs*, Pet. C. C. 155.

22. Nothing can be assigned for error which contradicts a record. *Ib.*

23. Facts in opposition to the record of a judgment obtained in one state cannot be alleged to contradict the judgment in an action brought upon it in another state. A judgment in one state is conclusive between the parties in another state. *Ib.*

24. Construction of the act of Congress of 26th May, 1790, entitled "An Act to prescribe the mode in which the public acts, records, and judicial proceedings in each state shall be authenticated, so as to take effect in every other state." In a judgment obtained in one state against a person residing in another state, who had no notice of the suit, the remedy of the defendant is by application to the court in which the judgment was entered. The attorney and the plaintiff are answerable in damages to the defendant; so also is the officer to whom the process was delivered, if the judgment was entered by default. *Ib.*

25. (June, 1840.) *Nil debet* cannot be pleaded to an action on a judgment. *Jacquette v. Hugunon*, 2 McLean, 129.

26. The plea of *nul tiel record* brings before the court the validity of the judgment and the description of it, as set forth in the declaration. *Ib.*

27. A release, the Statute of Limitations, or payment, may be pleaded. *Ib.*

28. (June, 1846.) Where from the record it appears that there was no personal service on the defendant, who entered no appearance, the judgment is a nullity. *Thompson v. Emmert*, 4 McLean, 96.

29. To such a record the plea of *nul tiel record* is proper. *Ib.*

30. (June, 1846.) Under the plea of *nul tiel record*, the judgment only is put in issue. *Bergen v. Williams*, 4 McLean, 125.

31. (Oct., 1850.) To an action on a judgment, the defendant cannot in his plea contradict the record. *Todd v. Crumb*, 5 McLean, 172.

32. (May, 1853.) Where a suit is founded on the record of a judgment, in which the court has jurisdiction, no error in the proceeding can be considered. *French v. Lafayette Ins. Co.*, 5 McLean, 461.

33. Nor in such a case can *nil debet* be pleaded. *Ib.*

34. (Jan., 1860.) A release of a judgment which has been subsequently revived by *scire facias* cannot be pleaded in an action brought on the revived judgment. *Snyder v. Brachen*, 5 Biss. 60.

35. (1870.) In an action on a foreign judgment, the debtor may plead as a defense that he was not served with process, and that the attorney who entered an appearance and filed

an answer for him had no authority to do so. *Arnott v. Webb*, 1 Dill. 362.

Plea. In Debt on Bond.

1. (Feb., 1806.) An assignment of debts and balances of accounts cannot be pleaded as an accord and satisfaction to an action of debt on bond. *Buddicum v. Kirk*, 3 Cranch, 293.

2. (Feb., 1823.) *Nil debet* is an improper plea to an action of debt upon a specialty or deed, where it is the foundation of the action. *Sneed v. Wister*, 8 Wheat. 691.

3. (Feb., 1825.) In a plea of justification by the marshal, for not levying an execution, setting forth a remission, by the Secretary of the Treasury, of the forfeiture or penalty on which the judgment was obtained, it is not necessary to set forth the statement of facts upon which the remission was founded. *United States v. Morris*, 10 Wheat. 246.

4. (Jan., 1843.) A plea alleging merely that seals were affixed to a bond, without the consent of the defendant, without also alleging that it was done with the knowledge or by the authority or direction of the plaintiffs, is not sufficient. *United States v. Linn*, 1 How. 104.

5. (Dec., 1850.) Where an action was brought by the United States upon the official bond of a receiver of public money, a plea that the United States had accepted another bond from the receiver was bad. The new bond could be no satisfaction for the damages that had accrued for the breach of the condition of the old one. *United States v. Girault*, 11 How. 22.

6. Pleas also were bad alleging that the receiver had made returns to the Treasury Department admitting that he had received money which the pleas asserted that he never had received. They were bad because they addressed themselves entirely to the evidence which it was supposed the United States would bring forward upon the trial. *Ib.*

7. Besides, these pleas were bad because the sureties in the bond were bound to protect the United States from the commission of the very fraud which they attempted to set up as a defense. *Ib.*

8. The case of the *United States v. Boyd* (5 How. 29) examined. *Ib.*

9. Another plea, taking issue upon the breach, should not

have been demurred to. The demurrer being general as to all the pleas, and bad as to this one, judgment was properly given against the plaintiffs in the court below. *Ib.*

10. (Dec., 1853.) Where a clerk of a court was sued upon his official bond, and the breach alleged was that he had surrendered certain goods without taking a bond with good and sufficient sureties, and the plea was that the bond which had been taken was assigned to the plaintiffs, who had brought suit, and received large sums of money in discharge of the bond, this plea was sufficient, and a demurrer to it was properly overruled. *Bevins v. Ramsey*, 15 How. 179.

11. (Dec., 1871.) On suit upon the coupons of railroad bonds payable, both bonds and coupons, by their terms, to the bearer, the declaration alleging the plaintiff to be owner, holder, and bearer of the coupons, a plea that the plaintiff was not, either at the time when the declaration or when the plea was filed, the owner, holder, or bearer, is a traverse of a material allegation of the declaration, and, though faulty as argumentative, must, on general demurrer, be held good. *Pendleton County v. Amy*, 13 Wall. 297.

12. So, on like sort of demurrer, a plea that at the times named the bonds and coupons were all the property of one A. R., a citizen of K. (the same state of which the defendant was a citizen), and not of any other person. *Ib.*

13. So, on like sort of demurrer, when the declaration alleged that the coupons sued on were for interest on bonds that had been issued by a county, and delivered by it to a certain railroad company, in payment by the county of a subscription to stock of the road, under an authority given by acts of the legislature, a plea that the county did not sign, seal, or deliver the bonds and coupons to the company, as in the declaration alleged, and "so that the alleged acts and coupons are not its acts and deeds." *Ib.*

14. (Oct., 1873.) On a suit by the government against the sureties of a postmaster, on his official bond, it is no defense that the government, "through their agent, the auditor of the treasury of the Post-Office Department, had full notice of the defalcation and embezzlement of funds of the plaintiff before them, and yet neglectfully permitted the said postmaster to remain in office, whereby he was enabled to commit all the default and embezzlement," &c. *Jones v. United States*, 18 Wall. 662.

15. (Oct., 1874.) In an action on the bond given on appeal from the District Court to the Supreme Court of the Territory of Montana, the plea was that the defendant had prosecuted a writ from the judgment of the territorial court to the Supreme Court of the United States, and had executed his bond, which operated as a *supersedeas* of that judgment, and that no *remititur* or mandate had issued from the latter court, and that the judgment of the Supreme Court of the territory still remained in the court so stayed by the *supersedeas* bond and the order thereon. *Gillette v. Bullard*, 20 Wall. 571.

16. This plea is insufficient in that it does not aver that at the commencement of this action the appeal was then pending in this court, or had ever been perfected. Nor is the case altered by the Practice Act of Montana, which enacts in its seventy-eighth section that, "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice." *Id.*

17. (Oct., 1875.) In a suit by a company organized under the laws of the State of New York against citizens of the State of Alabama, on a bond conditioned for the faithful performance of duty, and the payment of money received for it, executed by the agent of the company, who transacted business as such in the city of Mobile, where he resided, and by them as his sureties, the latter pleaded that the company, as a condition upon which it would retain in its employment the agent, then largely indebted to it, required such bond, and also his agreement to apply all his commissions thereafter earned to his former indebtedness to it; that the agreement was made, and the commissions were so applied; that the company knew that the agent had no property, and depended upon his future acquisitions for the support of himself and family; that the defendants were ignorant of such indebtedness and agreement; that, had they been informed thereof, they would not have executed the bond; that the agreement as to the commissions and its performance were a fraud on them; and that the bond as to them was thereby avoided, — *Held*, that the plea was bad, as it set forth neither the circumstances attending the delivery of the bond, nor averred misrepresentations, fraudulent concealment, opportunities to make disclosures on the part of the company, inquiries by the sureties before the bond was delivered, or knowledge by the company

that the sureties were ignorant of the facts complained of. *Held*, further, that this agreement had no such connection with the undertaking of the sureties as to give them a right to be informed thereof, except in answer to inquiries. As none were made, the company was under no obligation to volunteer the disclosure. *Magee v. Manhattan Life Ins. Co.*, 2 Otto, 93.

18. (Oct., 1846.) Where a suit is on a bond to secure a faithful performance of various duties in a secretary and treasurer to a private association, the defendant, who is surety, the principal being dead, craves oyer of the bond and conditions, and pleads general performance, it is sufficient in his situation and in the first instance. *Jackson v. Rundlet*, 1 Woodb. & M. 381.

19. (April, 1835.) Where one committed to prison upon a judgment recovered against him as bail, in a suit for a penalty, under the act of Congress of Aug. 2, 1813, brought in a state court, was discharged from imprisonment under a law of the state, and the defendant pleaded such discharge in bar of an action of debt brought by the United States on the bond given for the jail liberties, it was *held* that the plea was good; and a judgment rendered upon a demurrer to the plea was reversed. *Stearns ads. United States*, 2 Paine, 301.

20. (June, 1869.) Where, in an action of debt on a bond, in the penalty of £20,000 sterling, British money, conditioned for the payment of £10,000 sterling, with interest, the declaration claimed that the defendant should render to the plaintiff the £20,000, and averred that that sum was equivalent to the sum of \$140,000, United States money, and the defendant pleaded: (1.) That neither the £20,000 sterling, nor the £10,000 sterling with interest, was equivalent to \$140,000, United States money, and that the defendant was not indebted to the plaintiff in the last-named sum; and (2.) That the defendant did not owe, on an open or running account, for the payment of which the bond was given as collateral security, as much as \$140,000, — *Held*, on demurrer, that both of the pleas were bad. *Gurney v. Hoge*, 6 Blatchf. 499.

21. (April, 1812.) Debt on bond conditioned to deliver to the plaintiff or his agent, in B., a quantity of whiskey, in all the month of May, 1809. Plea, that in all the month of May, 1809, the defendant was ready and willing to deliver to the plaintiff or to his agent, at the place of embarkation in B., the whiskey, according to the condition of the bond; but the plaintiff or his

agent was not then and there ready to accept the same. *Savary v. Goe*, 3 Wash. 140.

22. The rule of law is that if the condition of the bond is not parcel of the obligation, as if the latter be a money penalty, and the former be to do some act, as to deliver goods, &c., it is not necessary for the defendant to plead *uncore prist*. *Ib*.

23. The rules of pleading require that the plea should be direct in stating with sufficient precision the matter of defense, and not leave it to be found out by inference, however strong. *Ib*.

24. The plea in this case is bad, as it does not state that the defendant was at the place of embarkation, in person or by agent, ready and prepared to deliver the whiskey. *Ib*.

25. (April, 1823.) *Comperuit ad diem, prout*, &c., affirms a legal appearance. *Bobyshall v. Oppenheimer*, 4 Wash. 388.

26. (Nov., 1811.) Where the statute prescribed *twice* the value as the penalty [of a statutory bond] and the defendant pleaded that the bond was taken in more than *thrice* the value, and that it was obtained by *constraint*, and the plaintiffs demurred to the plea, thus admitting the allegations of the plea, the demurrer was properly overruled. The plea was good, and the bond a nullity. *United States v. Gordon & Shepherd*, 1 Brock. 190.

27. (May, 1841.) *Nil debet*, when pleaded to a declaration on a penal bond, where breaches are assigned, will not be set aside on motion, but must be demurred to. *United States v. Spencer*, 2 McLean, 405.

28. Where a plea sets up no new matter of defense, it may be set aside on motion. *Ib*.

29. (May, 1843.) The plea of *nil debet* is improper where the action is founded on a deed. If the deed be only inducement to the action, that plea is proper. *United States v. Cumpston & Coleman*, 3 McLean, 163.

30. (Dec., 1843.) Want of consideration, on general principles, cannot be pleaded to a bond, nor fraud, except to the execution of the instrument. *Greathouse v. Dunlap*, 3 McLean, 303.

31. But under the statute of Ohio both of these defenses to a sealed instrument may be made. *Ib*.

32. To an action on a bond to pay the sum that shall be recovered in a certain action then pending between different parties, a defense cannot be set up which might have been available in the first action. *Ib*.

33. Fraud between the parties to such action might be shown. Bail cannot go behind the judgment against the principal. The first judgment cannot be impeached collaterally. The amount of the judgment is as conclusive against the bail as against the principal. *Ib.*

34. Every plea in discharge or in avoidance of a bond should state particularly the matters of discharge or avoidance. *Ib.*

35. Where a bond is required in restraint of liberty, which the law does not authorize or require, it is void. But in such a case the facts must be specially alleged; they cannot be presumed. *Ib.*

36. Matters which make a deed void may be given in evidence under the general issue of *non est factum*, but matters in avoidance must be pleaded. *Ib.*

37. (May, 1850.) To an action of debt for \$804 the defendants pleaded, that the obligee represented to them that he had a requisition on them from the governor of Ohio to the governor of Indiana, to surrender them on a charge of larceny in Ohio, which was false, but in consequence of which the bond was given. The demurrer admitted the fraud alleged in the plea, and the plea was sustained. *Bell's Assignee v. Nimmo*, 5 McLean, 109.

38. (Jan., 1869.) A breach of the condition of a penal bond is not sufficiently traversed by a plea averring that the obligors have not violated the condition to the extent charged in the declaration. It should deny any breach of the condition as charged in the declaration. *United States v. Dair*, 4 Biss. 280.

39. A special plea of *non est factum*, averring that the supposed bond sued on is a mere escrow, is bad, unless it avers that the instrument in question was delivered to some third person, on a condition that has not been performed. But with such an averment the plea may be a good special *non est factum*. *Ib.*

40. (Jan., 1869.) In a suit on a distiller's bond, against him and his sureties, one of the sureties pleaded that he signed the bond, and delivered it to the principal obligor on condition that it should not be delivered to the obligee till it was signed by one B.; that said B. never signed it; that the agent of the obligee, when he accepted and approved the bond, had notice of said conditional delivery; and that so the writing was not the surety's deed. *Held*, that as to the surety the writing was a mere escrow, and that the plea was good. *United States v. Hammond*, 4 Biss. 283.

41. The condition of the bond was that the principal obligor, a distiller, should faithfully comply with all the requirements of law in relation to distilled spirits. And the breach laid was that the principal obligor, having manufactured one thousand gallons of spirits at his distillery, had sold and removed for sale the same therefrom without first paying the taxes thereon as required by law. Plea, that he did not sell or remove for sale said spirits, or any part thereof, without having first paid the tax thereon as required by law. *Held*, a good plea on general demurrer. *Ib.*

42. (June, 1870.) In an action on a distiller's bond, under the act of Congress of July 20, 1868, a plea that the still blew up, of which the assessor was duly notified, whereupon he locked up and took control of the property, is a good plea as to the time the still was thus disabled. *United States v. Miller*, 5 Biss. 128.

Plea. Bankruptcy.

1. (Oct., 1875.) A court cannot take judicial notice of the proceedings in bankruptcy in another court; and it is its duty to proceed as between the parties before it, until, by some proper pleadings in the case, it is informed of the changed relations of any of such parties to the subject-matter of the suit. *Eyster v. Gaff*, 1 Otto, 521.

2. (July, 1844.) Where a suit is commenced against the bankrupt, and property attached on mesne process, before proceedings in bankruptcy, the certificate in bankruptcy may be pleaded in bar of further proceedings in the suit. *In the Matter of Bellows & Peck*, 3 Story, 428.

3. (Nov., 1875.) A discharge in bankruptcy must be pleaded. It cannot be set up after judgment as a reason why the judgment should not be enforced. *Goodrich v. Hunton*, 2 Woods, 138.

4. (Oct., 1843.) Bankruptcy should be pleaded at law and in equity. Until this is done the plaintiff has no notice of the bankruptcy. The defendant may waive his discharge. *Fellows v. Hall & Allen*, 3 McLean, 281.

5. (Oct., 1843.) A plea of bankruptcy which sets out the certificate and discharge, as required in the fourth section [of the Bankrupt Act of Aug. 19, 1841], is good. *White v. How*, 3 McLean, 291.

Plea. In Action of Covenant.

1. (Feb., 1810.) If the breach of covenant assigned be that the *state* had no authority to sell and dispose of the land, it is not a good plea in bar to say that the *governor* was legally empowered to sell and convey the premises, although the facts stated in the plea as an inducement are sufficient to justify a direct negative of the breach assigned. *Fletcher v. Peck*, 6 Cranch, 87.

2. (Oct., 1876.) Defendants who have actually received the consideration of a written agreement cannot in an action brought against them for a breach of their covenants, set up that the agreement did not bind the plaintiff to perform his covenants, provided it appears that he has performed them in good faith and without prejudice to the defendants. *Storm v. United States*, 4 Otto, 76.

3. (April, 1810.) Action of covenant upon an agreement under seal, by which the plaintiff stipulated to perform, in the Philadelphia and Baltimore theatres, for three years, and not to play or sing at any other theatre without the license of the defendant; and the defendant agreed to pay the plaintiff so much per week, and to allow him the profits of a benefit and a half each season, provided the plaintiff kept and performed all his covenants, and not otherwise.

The defendant pleaded covenants performed, with leave to give in evidence everything which amounts to a legal defense.

The plea, according to its import and the understanding of the bar, amounts to an agreement that the defendant may give in evidence anything which he might plead, and which in point of law can protect him from the plaintiff's claim. *Webster v. Warren*, 2 Wash. 456.

4. (March, 1864.) A judgment for taxes, sale, and tax deed constitute a breach of the covenant; and it is not a good plea that the sale was not valid. *Vorhis v. Forsythe*, 4 Biss. 409.

Plea. In Actions by and against Executors and Administrators.

1. (Dec., 1869.) In an action by a plaintiff as administrator, a plea to the merits admits the representative character of the plaintiff to the extent stated in the declaration; and if that statement is consistent with the grant of letters within the state, it

also admits his right to sue in that capacity ; but such a plea admits nothing more than the title stated in the declaration. *Noonan v. Bradley*, 9 Wall. 394.

2. In an action by a plaintiff as an administrator, the objection that, as to the causes of action stated in the declaration, he is not, and never has been, administrator of the effects of the deceased, may be taken by a special plea in bar. *Ib.*

3. In an action in one state by an administrator appointed in another state, on a bond given to the intestate, a plea that the bond was *bona notabilia* on the death of the decedent in the state other than the one which appointed the administrator, suing as plaintiff, and that an administrator of the effects of the decedent in that state has been appointed and qualified, is a good answer to the action. It is an averment of facts which in law excludes all right to and control over the property in that state by the foreign administrator. *Ib.*

4. (Oct., 1821.) A general plea of *plene administravit* may be good where all the property of the intestate has been exhausted in a regular course of administration. But if exhausted in paying debts, without notice of a debt having a legal priority, that fact should be specially pleaded. *United States v. Hoar*, 2 Mason, 311.

5. In what cases a special plea of *plene administravit* is necessary at the common law or under Massachusetts statutes. *Ib.*

6. (1870.) Where the statute classifies the debts against an estate, directs the order of payment, and only makes an administrator liable to the extent of assets received, the common-law plea of *plene administravit* is no defense, and is not proper in an action against the executor merely seeking to establish the existence of the plaintiff's debt against the estate. *Covington v. Burnes*, 1 Dill. 16.

Plea. Former Judgment.

1. (Jan., 1836.) A judgment that a declaration is bad in substance (which alone, and not matter of form, is the ground of a general demurrer) can never be pleaded as a bar to a good declaration for the same cause of action. The judgment is in no just sense a judgment upon the merits. *Gilman v. Rives*, 10 Pet. 298.

2. (Jan., 1839.) An attachment commenced, and conducted to a conclusion before the institution of a suit against the debtor,

in a court of the United States, may be set up as a defense to the suit, and the defendant would be prohibited *pro tanto* under a recovery had by virtue of the attachment, and could plead such recovery in bar. So, too, an attachment pending in a state court, prior to the commencement of a suit in the court of the United States, may be pleaded in abatement. The attachment of the debt in such case, in the hands of the defendant, would fix it there in favor of the attaching creditors, and the defendant could not afterwards pay it over to the plaintiff. The attaching creditor would in such a case acquire a lien on the debt, binding on the defendant, and which the courts of all other governments, if they recognize such proceedings at all, would not fail to regard. The rule must be reciprocal; and when the suit in one court is commenced prior to proceedings under attachment in another court, such proceedings cannot arrest the suit. *Wallace v. McConnell*, 13 Pet. 136.

3. (Dec., 1853.) A judgment of *non pros.*, given by a state court, in a case between the same parties for the same property, was not a sufficient plea in bar to prevent a recovery under a writ of right; nor was the agreement of the plaintiff to submit his case to that court, upon a statement of facts, sufficient to prevent his recovery in the Circuit Court. *Homer v. Brown*, 16 How. 354.

4. The consequences of a nonsuit examined. *Ib.*

5. (Dec., 1868.) A reversal in a court of last resort, *remanding a case*, cannot be set up as a bar to a judgment in an inferior court, on the same case. *Aurora City v. West*, 7 Wall. 82.

6. The plea of *res judicata* applies to every objection urged in a second suit, when the same objection was open to the party within the legitimate scope of the pleadings in a former one, and might have been presented in it. *Ib.*

7. (Oct., 1875.) If judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause, upon the same grounds as were disclosed in the first declaration; but if the plaintiff fails on demurrer in his first action, from the omission of an essential allegation in his declaration, which is supplied by the second suit, the judgment in the first suit is not a bar to the second. *Gould v. Evansville & Crawfordsville Railroad Co.*, 1 Otto, 526.

8. (Oct., 1875.) If the agreement under which the suit was

dismissed, settled or released the matter in controversy, that fact must be shown by the plea, to render it available as a bar to a second suit in respect to the same matter. *Haldeman v. United States*, 1 Otto, 584.

9. (Oct., 1878.) That the said judgment [of the state court of Louisiana, under the circumstances of this case] is not a bar to this suit [in the Circuit Court of the United States]. *Gordon v. Gilfoil*, 9 Otto, 169.

10. (Oct., 1879.) A District Court of Louisiana — continued in existence after the military occupation of the state by the United States, and authorized by the commanding general to hear causes between parties — summoned a brigadier-general of the army of the United States to answer a petition filed therein, setting forth that a military company had, pursuant to his orders, seized and carried off certain personal property of the plaintiff, who alleged that the seizure was unauthorized by the necessities of war, or martial law, or by the superiors of that officer. Judgment by default was rendered, April 9, 1863, against him, for the value of the property. When sued in the Circuit Court of the United States, upon the judgment, he pleaded that the property was taken to supply the army. *Held*, on demurrer to the plea, that the state court had no jurisdiction of the cause of action, and that the judgment was void. *Dow v. Johnson*, 10 Otto, 158.

11. (Oct., 1847.) A prior judgment between parties not nominally the same must be averred and proved to be between privies in interest, or it is no bar. *Greely v. Smith*, 3 Woodb. & M. 236.

12. So a prior judgment of nonsuit between the same parties, on the same subject, must be alleged to have been on the merits, in order to prevent a recovery. *Ib.*

13. (Nov., 1855.) A foreign judgment does not merge the original cause of action, and cannot be pleaded in bar of an action founded thereon. *Lyman v. Brown*, 2 Curt. C. C. 559.

14. (Oct., 1860.) A judgment of nonsuit, even upon an agreed statement of facts, cannot be pleaded in bar to a new suit, although rendered by a court of competent jurisdiction, between the same parties, and for the same subject-matter as in the second suit. *Derby v. Jacques*, 1 Cliff. 425.

15. (May, 1870.) Where the adjudication is upon the same title, a former judgment, if regularly pleaded, is often a bar to

the second suit, though some of the parties may be different. *Richardson v. Lockwood*, 4 Cliff. 128.

16. (Oct., 1848.) Where a bond, with sureties, was given by H. to the government, for the faithful performance of his duties as collector of customs, and subsequently an additional bond, with a different surety, but with a like penalty and condition, was given by H., and a judgment was perfected against H. on the latter bond, — *Held*, in a joint action against the obligors in the former bond, that a plea setting up the judgment, and averring that in the two actions the plaintiffs sought to recover the same identical sum of money, and upon the same identical breaches of each bond, was not a good plea. *United States v. Hoyt*, 1 Blatchf. 326.

17. (Oct., 1879.) A suit which is dismissed for want of prosecution is no bar to a subsequent suit for the same cause of action. *American Diamond Rock-Boring Co. v. Sheldon*, 17 Blatchf. 208.

18. (Nov., 1824.) The dismissal of a suit agreed does not amount to a *retraxit*, and is no bar to a future suit for the same cause of action. *Hoffman v. Porter*, 2 Brock. 156.

19. (June, 1879.) In a suit brought to enforce payment of a debt secured by an assignment out of a trustee's estate, on the ground of breach of trust, — *Held*, that a former suit is invalid, as a plea of *res judicata*, unless the record shows that the same subject-matter was involved, and the same questions raised, or so involved in the main object of the controversy as to spring necessarily therefrom. *Clark v. Gibboney's Executrix*, 3 Hughes, 391.

20. (July, 1840.) This court is presumed to know the laws of the respective states, and consequently that the Circuit Court of Wayne County, in Michigan, is a court of general jurisdiction. It is not necessary, therefore, in the plea setting up the judgment of the Circuit Court of Wayne, to aver that it had jurisdiction. *Woodworth v. Spaffords & Earl*, 2 McLean, 168.

21. A judgment obtained against Earl, in a suit against him and the other two defendants, merges the instrument on which the action was founded. And such judgment may be pleaded in bar to an action on the instrument against one or all of the defendants. *Id.*

22. (July, 1875.) In assumpsit upon a promissory note, the bar of a judgment in another state upon the same note is not avoided by the record of an action upon that judgment to which

the defendant pleaded *nul tiel record*, and in which action plaintiff took a nonsuit. The plea of the judgment is good, there is no estoppel, and the second record is not admissible in evidence. *Michigan Ins. Bank v. Eldred*, 6 Biss. 370.

23. (Sept., 1874.) Where leave to set up by way of amended answer, a former judgment between the same parties upon the same subject-matter had been denied, pending an appeal from the judgment sought to be set up, leave to file a supplemental answer setting up said judgment was granted, upon renewal of the motion upon leave, after the judgment had become final by affirmance on appeal. *Robinson v. Satterlee*, 3 Sawyer, 134.

24. (Nov., 1876.) Under the statute of Nevada, authorizing the defendant to set up in his answer as many defenses as he has, if an answer contains a defense which only goes to defeat the present action, and other defenses on the merits, and the issues as to both are in fact found for defendant, but the judgment is apparently entered for defendant upon the finding on the merits, the matter upon the merits will be *res judicata*, and the parties will be estopped from further litigating the merits, even though the issue upon the matter of abatement is also found in favor of defendant, and the judgment might have been rested on that issue. *The 420 Mining Co. v. The Bullion Mining Co.*, 3 Sawyer, 634.

25. In such case, where all the issues are in fact specially found in favor of the defendant, and judgment entered thereon generally, without any provision that it shall be without prejudice, or without any other limitation or restriction, the estoppel will extend to every matter of fact in issue, and in fact found by the court in favor of the defendant. *Ib.*

26. Where the statute authorizes the defendant to set up in the same answer as many defenses as he has, and several defenses are set up, it is competent for the court to determine them all, without reference to the character of the different defenses; and where all are in fact determined, the determination as to all will be conclusive between the parties. *Ib.*

27. (Sept., 1876.) In a plea of a former judgment in an action at law, it is a sufficient description of the cause of action in the first action to allege that it was identical with that stated in the complaint in the action pending. *Wythe v. City of Salem*, 4 Sawyer, 88.

Plea. Estoppel.

1. (May, 1830.) The government is not ordinarily bound by an estoppel. *Johnson v. United States*, 5 Mason, 425.

2. (Sept., 1876.) A plea of estoppel by conduct, not showing that the defendant was ignorant of the truth of the matter, or could not have conveniently ascertained the same, nor that the defendant had acted upon the matter claimed as an estoppel, stricken out on motion of plaintiff. *Wythe v. City of Salem*, 4 Sawyer, 88.

Plea. Action on Contract.

1. (Dec., 1863.) The statute of Indiana, passed Feb. 23, 1853, which authorizes connecting railroad corporations to merge and consolidate their stock, and make one joint company of the roads thus connected, causes, when the consolidation is effected, as is declared by the Supreme Court of the state, in *McMahon v. Morrison* (16 Ind. 172), a dissolution of the previous companies, and creates a new corporation with new liabilities, derived from those which have passed out of existence. Hence, where the declaration avers that the defendant had agreed that stock of a particular railroad in Indiana should be worth a certain price at a certain time and in a certain place; and the plea sets up that under the above-mentioned statute of Feb. 23, 1853, the stock of the railway named was merged and consolidated *by the consent of the party suing* with a second railway named, so forming "one joint-stock company of the said two corporations," under a corporate name stated, — such plea is good, though it does not aver that the consolidation was done without the consent of the defendants. *Clearwater v. Meredith*, 1 Wall. 25.

2. (Dec., 1868.) Where a suit is brought upon a contract which is void as against public policy and the laws, a party who pleads such invalidity of it does not render the plea ineffective by a further defense in "reconvention;" a defense of this sort, to wit, that if the contract be valid he himself takes the position of a plaintiff, and makes a claim for damages for its non-performance. *Coppell v. Hall*, 7 Wall. 542.

3. (April, 1848.) Where a policy of insurance provided that no action should be sustained against the insurer, founded thereon, unless brought within twelve months after the cause of action

should accrue, and that the lapse of time, in case of such suit, should be deemed conclusive evidence against the validity of the claim set up, — *Held*, that a plea setting up such provision and the lapse of the time specified, in bar of an action on the policy, was a conclusive answer to the suit. *Cray v. Hartford Fire Ins. Co.*, 1 Blatchf. 280.

4. (July, 1878.) Such a defense [that the agreement was void, because against public policy] can be set up under a plea of the general issue. *Oscanyan v. Winchester Repeating Arms Co.*, 15 Blatchf. 79.

5. (Oct., 1870.) A plea that the written contract set forth in the declaration is not the contract made by the parties, but is a fraud upon the defendant, is bad on demurrer. It is an attempt to change a written contract by oral testimony, and is also bad for uncertainty. *McDonald v. Orvis*, 5 Biss. 183.

6. (May, 1880.) Where a policy of insurance provides for an arbitration to determine the amount of loss, in case differences arise touching the same, “and upon the written request of either party,” and also that no suit shall be sustainable until after an award shall have been obtained in the manner above provided, — *Held*, that the defense that plaintiff has refused to arbitrate cannot be made where neither party has made a written request for such arbitration; and *held*, further, it makes no difference that one or the other party has refused to arbitrate, upon a verbal request to do so, or may have refused to make such request in writing. *Wallace v. German-American Ins. Co.*, 1 McCrary, 335.

Plea. In Replevin.

1. (Oct., 1817.) *Non cepit* in replevin puts in issue the question of general property only, and not of special property; at least in a suit between the principal and his agent. On *non cepit*, the issue must be for the defendant, if there was not a wrongful taking of the goods from the possession of another. *Meany v. Head*, 1 Mason, 319.

Plea. In Actions upon Patent-right.

1. (Feb., 1818.) Under the sixth section of the patent law of 1793, ch. 156, the defendant pleaded the general issue, and

gave notice that he would prove at the trial that the machine, for the use of which, without license, the suit was brought, had been used previous to the alleged invention of the plaintiff in several places which were specified in the notice, or in some of them, "and also at sundry other places in Pennsylvania, Maryland, and elsewhere in the United States." The defendant, having given evidence as to some of the places specified, offered evidence as to others not specified. *Held*, that this evidence was admissible. But the powers of the court in such a case are sufficient to prevent, and will be exercised to prevent, the patentee from being injured by surprise. *Evans v. Eaton*, 3 Wheat. 454.

2. (Jan., 1832.) The defendant, in the Circuit Court, in his plea assigned the particular defect supposed to exist in the specification, and then proceeded to answer, in the very words of the act, "that it does not contain a written description of the plaintiff's invention and improvement, and manner of using it, in such full, clear, and exact terms as to distinguish the same from all other things before known, so as to enable any person skilled in the art to make and use the same." The plea alleged, in the words of the act, that the prerequisites to issuing a patent had not been complied with. The plaintiffs denied the facts alleged in the plea, and on this issue was joined. At the trial the counsel for the defendants, after the evidence was closed, asked the court to instruct the jury that, if they should be of opinion that the defendants had maintained and proved the facts alleged in the plea, they must find for the defendants. The court refused this instruction, and instructed the jury that the patent would not be void on this ground, unless defective or imperfect specification or description arose from design, or for the purpose of deceiving the public. BY THE COURT: The instruction was erroneous, and the judgment of the Circuit Court ought to be reversed. *Grant v. Raymond*, 6 Pet. 219.

3. If the party is content with defending himself, he may either plead specially or plead the general issue and give the notice required by the sixth section, of any special matter he means to use at the trial. If he shows that the patentee has failed in any of those prerequisites on which the authority to issue the patent is made to depend, his defense is complete. *Id.*

4. The defendant is permitted to proceed according to the sixth section, but is not prohibited from proceeding in the usual man-

ner, so far as respects his defense, except that special matter may not be given in evidence on the general issue, unaccompanied by the notice which the sixth section requires. *Ib.*

5. (Oct., 1875.) A contract concerning the use of a patented invention bound the "parties and their legal representatives to the covenants and agreements of the contract." A plea alleged that the defendants "are the legal representatives and successors and assignees in business and interest" of one of the parties. The question being on the sufficiency of this plea, — *Held*, that the defendants were the legal representatives of that party, within the meaning of the contract. *Hammond v. Mason & Hamlin Organ Co.*, 2 Otto, 724.

6. An allegation that L. refused to manufacture and furnish his invention as he had agreed to do, is equivalent to an allegation of a demand on him to do so, and a refusal. *Ib.*

7. (Oct., 1876.) To defeat a party suing for an infringement of letters-patent, it is sufficient to plead and prove that, prior to his supposed invention or discovery, the thing patented to him had been patented, or adequately described in some printed publication. A sufficiently certain and clear description of the thing patented is required, not of the steps necessarily antecedent to its production. *Cohn v. United States Corset Co.*, 3 Otto, 366.

8. (April, 1873.) The defense that the patentee had allowed his invention to be in public use, or on sale, for more than two years before he applied for a patent, is distinct from the defense that he had abandoned it to the public, and should not be blended with it in the same pleading. *Jones v. Sewall*, 3 Cliff. 564.

9. (April, 1878.) A plea in defense, that "the invention named was in public use, and on sale, more than two years prior to the supposed invention of the complainant's," overruled, as not within any one of those allowed by statute. *Kelleher v. Darling*, 4 Cliff. 425.

10. (Oct., 1850.) Where the defendant in a patent suit pleaded the general issue and special pleas, and also gave notice of special matter under sec. 15 of the Patent Act of July 4, 1836 (5 Stat. 123), and the matters set forth in the special pleas were those of which notice might have been given under sec. 15, the court, on the plaintiff's motion, struck out the special pleas with costs. *Wilder v. Gayler*, 1 Blatchf. 597.¹

¹ See p. 455, subd. 15.

11. Notice must be given of the several matters specified in sec. 15, if they are relied on in defense. They cannot be pleaded specially. *Ib.*

12. There may, however, be grounds of defense not specified in sec. 15, which might be set up in bar of the action, by special plea. *Ib.*

13. (May, 1854.) Where, in an action on the case for the infringement of letters-patent, brought by an assignee of the patentee, the defendant, with the general issue, without any notice of special matter, pleaded special pleas, not impeaching the validity of the patent, or denying the use by him of the patented invention, but setting up a license under the patentee paramount to the right of the plaintiff. *Held*, that the special pleas were well pleaded, and could not be stricken out on motion. *Day v. New England Car-Spring Co.*, 3 Blatchf. 179.

14. *It seems* that the Supreme Court of the United States has decided that, in an action at law for the infringement of a patent, a defendant is not limited to the plea of the general issue, even if his defense rests on matters which he may, under sec. 15 of the act of July 4, 1836 (5 Stat. at Large, 123), give in evidence under the general issue, but that he may plead those matters specially. *Ib.*

15. The case of *Wilder v. Gayler* (1 Blatchf. C. C. R. 597) questioned, as being in conflict with *Evans v. Eaton* (3 Wheat. 454) and with *Grant v. Raymond* (6 Pet. 218). *Ib.*

16. (Oct., 1854.) A. and B. were joint patentees. A. assigned to B. his right for New York. B. then assigned to C. the undivided half of the patent for New York, and agreed with C. that, in case of the extension of the patent, C. should have and be entitled to the undivided one-fourth of the patent for New York, on paying to B. the proportional one-fourth part of the expenses of the extension, — that is, to be proportioned as the value of the right for New York should be to that for the rest of the United States, and C. to pay the one-fourth part of the proportion for New York. The agreement was recorded. The patent was extended, and, after the extension, C. requested B. to inform him what the expenses of obtaining the extension had been, and offered to pay him the proportion of expenses mentioned in the agreement to be paid to B. by C. B. refused to inform C. what the amount of the expenses had been. C. was ignorant of the

amount, and B. knew the fact. C. then went on, after the extension, to work under the patent, and was sued for infringement by A. and B. C. pleaded specially the above matters. *Held*, on demurrer to the plea, that the agreement was a valid executory agreement, entitling C. to the undivided interest in the extended patent, on the performance of the condition precedent as to the payment of the specified portion of the expenses of obtaining the extension. *Pitts v. Hall*, 3 Blatchf. 201.

17. *Held*, also, that the offer by C. to perform the condition precedent did not vest in C. the undivided interest in the extension, and that the plea was bad. *Ib.*

18. *Seemle*, that the plea would be bad, even if the undivided interest in the extension had vested in C. *Ib.*

19. (May, 1862.) In an action at law for the infringement of letters-patent, by selling to others to be used the patented improvement, a special plea set forth that the alleged selling, if any such was made by the defendant, was made by him solely as the agent of another person, and not for profit, or on account of the defendant, and that the defendant derived no profit or advantage whatever therefrom. *Held*, on special demurrer to the plea, that it was bad, because it was hypothetical, and did not admit the cause of action set forth in the declaration, but sought to avoid, without admitting, the same; and that it was also bad because it did not state the name of the person for whom the defendant claimed to have acted as agent. *Morse v. Davis*, 5 Blatchf. 40.

20. *Seemle*, that the facts set up in the plea would not constitute a defense. *Ib.*

21. (Aug., 1865.) Where the patentee of a machine grants an exclusive right, under his patent, to make and sell machines in a given territory, for a specified fee to be paid to him for each machine made and sold, and brings a suit against the grantee to recover fees due and unpaid for machines made and sold, it is no defense, by way of special plea in bar of the action, that the plaintiff has infringed such exclusive right. *Birdsall v. Perego*, 5 Blatchf. 251.

22. Nor is it a defense, by way of plea in bar, that the plaintiff was not the first and original inventor of what his patent claims. *Ib.*

23. (Oct., 1868.) The issue of fraud can be raised only by

distinct and special allegations in the plea or answer. *Blake v. Stafford*, 6 Blatchf. 195.

24. What allegations, in a notice under the general issue, are sufficient to raise a question of fraud, considered. *Ib.*

25. (Feb., 1859.) The defendant pleaded the general issue, and gave notice under sec. 15 of the act of July 4, 1836, attacking the novelty of the plaintiff's patent. He also filed special pleas, averring prior use and invention, abandonment, &c. Upon motion the special pleas were stricken out. *Latta v. Shawk*, 1 Bond, 259.

26. (July, 1846.) To an action for an infringement of a patent-right, a plea that the thing claimed to have been invented was in use and for sale before the application for the patent, is demurrable, unless the plea aver an abandonment, or that such sale or use was more than two years before the application. *Root v. Ball & Davis*, 4 McLean, 177.

27. Where the use or sale has not exceeded two years before the application, the act of the 3d of March, 1839, declares it shall not invalidate the patent. *Ib.*

28. There must be special pleas or the general issue, and notice of special matters. *Ib.*

29. (May, 1849.) A special plea or notice must be filed thirty days before the term, in a patent case, or the plaintiff will be entitled to a continuance. *Phillips v. Combstock*, 4 McLean, 525.

Notice of Prior Use, &c., in Actions for Infringement of Patent-right.

1. (Dec., 1859.) By the fifteenth section of the Patent Act of the 4th of July, 1836, the defendant is permitted to plead the general issue, and give any special matter in evidence, provided notice in writing may have been given to the plaintiff or his attorney thirty days before the trial. *Teese v. Huntingdon*, 23 How. 2.

2. It is not necessary that this should be served and filed by an order of the court; and it is sufficient if it was served and filed subsequently to the time when the depositions were taken and filed in court. *Ib.*

3. (Nov., 1870.) Where, in a suit for infringement of a patent, no question is made by the pleadings as to the novelty

and originality of the patented invention, and the prior use relied on in defense is a use by the inventor or under his license, it is not necessary to give notice of the persons so using the invention, or the places where it was used. *Hide & Leather Splitting Co. v. Tool Co.*, 1 Holmes, 503.

4. (Feb., 1859.) A notice that a prior machine was used at "Cincinnati," "Covington," "Pittsburg," "Wayne County, Indiana," &c., is not sufficiently specific, and does not lay the foundation for the introduction of proof. *Latta v. Shawk*, 1 Bond, 259.

5. (Oct., 1859.) To defeat a patent by showing a prior use of the invention, the statute has expressly provided that notice must be given of the place where and the parties by whom the thing relied on as a defense has been used. The provision is designed to give the patentee the benefit of an examination into the facts of the supposed prior use. *Hays v. Sulzor*, 1 Bond, 279.

6. A reference to a county in which it is alleged the prior use took place is not sufficiently definite and explicit as to place, to fill the requirements of the spirit of the act. *Ib.*

7. (April, 1860.) The notice of special matter required under sec. 15 of the act of 1836 must give the name of some person who had knowledge of the prior use at the place indicated. It is not enough to name the parties using the thing. The notice must state the name of some witness. *Judson v. Cope*, 1 Bond, 327.

Plea. In Action of Trespass.

1. (Dec., 1856.) The plea of the general issue, in actions of trespass or case, does not necessarily put the title in issue. *Richardson v. City of Boston*, 19 How. 263.

2. (Dec., 1865.) A plea which does not deny that the property seized was the property of the plaintiff, or aver that it was liable to the writ under which it was seized, is bad in any court. *Buck v. Colbath*, 3 Wall. 335.

3. (Dec., 1871.) Where a plea relies on a statute authority as a defense, it must allege the facts which it asserts to be so authorized, and cannot plead generally that it complied with the statute. Hence a plea is bad which states that defendant raised the water in a lake no higher than the statute authorized, when

the state forbade the water being raised above its ordinary level. *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

4. Where a declaration charges a defendant with overflowing the plaintiff's land, by raising the water in the lake, a plea containing neither a denial of what is alleged, nor authority for doing it, is bad. *Ib.*

5. (Dec., 1872.) In a suit of trespass *de bonis asportatis*, against C. (a sheriff) and D. (the plaintiff in a writ of attachment executed by the said sheriff), a plea contains all the averments essential to a justification, when it alleges sufficiently that the chattels mentioned in the declaration were the property of B. on the 4th of May, 1867; that on the 3d of the same month a writ of attachment was issued out of the court of a county named, in favor of D., directed to the sheriff of the said county, commanding him to attach so much of the personal and real estate of said B. as should be sufficient to satisfy a sum specified; that on the said 3d of May the said C. was sheriff of the county named; that on the said day the writ of attachment was delivered to him to execute; and that, on the 4th of said May he levied upon the said goods and chattels, as the property of the said B., by virtue of the said writ, and that these were the supposed trespasses. And this is so, even though the plea do not allege that D. was a creditor of B., nor that the attachment was otherwise regularly issued, nor that D. did the acts complained of under the direction of the sheriff, nor that the attachment had been returned. *Deutsch v. Wiggins*, 15 Wall. 540.

6. However informal such a plea may be, the informality is not such as that, after a traverse of its allegations, issue, and trial, it can be taken advantage of on error. The plaintiff should have demurred. *Ib.*

7. (Oct., 1873.) Whenever one justifies an act which in itself constitutes at common law a wrong, upon the process, order, or authority of another, he must set forth substantially and in a traversable form the process, order, or authority relied upon; and no averment of its legal effect, without other statement, will answer. Accordingly, where certain military officers of the United States, being sued for the arrest and imprisonment of a person in Vermont, not connected with the military service of the United States, alleged in their pleas that the arrest and imprisonment were made under the authority and by the order of

the President, whose orders, as commander-in-chief of the armies of the United States, by the rules and regulations of the army, they were bound to obey, without setting forth any order, general or special, of the President, directing or approving of the acts in question, it was *held* that the pleas were defective and insufficient. *Bean v. Beckwith*, 18 Wall. 510.

8. The act of March 3, 1863, entitled "An Act relating to *habeas corpus*, and regulating judicial proceedings in certain cases," and the act of March 2, 1867, entitled "An Act to declare valid and conclusive certain proclamations of the President, and acts done in pursuance thereof, or of his orders in the suppression of the late rebellion against the United States," do not change the rules of pleading, when the defense is set up in a special plea, or dispense with the exhibition of the order or authority upon which a party relies. Nor do they cover all acts done by officers in the military service of the United States, simply because they are acting under the general authority of the President as commander-in-chief of the armies of the United States. Assuming that they are not liable to any constitutional objection, they only cover acts done under orders or proclamations issued by the President, or by his authority. *Ib.*

9. (Oct., 1878.) *Held*, . . . 4. That the plea [that the defendant burned the cotton by order of the commander of the Confederate forces in Mississippi] should, upon demurrer, be deemed as sufficiently averring the existence of such relations between B. and the Confederate military authorities as entitled him to make the same defense as if he had been such [Confederate] soldier. *Ford v. Surget*, 7 Otto, 595.

10. (May, 1878.) According to the jurisprudence of Texas, a defendant in an action of trespass to try title, who has pleaded not guilty, and has also, in pleading the Statute of Limitations, set up title in himself, is not precluded from showing the invalidity of the plaintiff's title. *Sheirburn v. Hunter*, 3 Woods, 281.

11. (Oct., 1854.) The declaration alleged that the defendants had placed piers in the principal channel of the river Illinois, so as essentially to obstruct its navigation, and that in consequence of such obstruction a loss was sustained. The defendants pleaded that, in placing the piers there, they had complied with the act of the legislature of Illinois authorizing a bridge to be constructed. *Held*, that the plea was not a good defense to the

action, but that it must go further, and deny that the bridge was a material obstruction to the navigation of the river. *Columbus Ins. Co. v. Curtenius*, 6 McLean, 209.

Plea. In Ejectment.

1. (Feb., 1808.) The plea of no rent arrear admits the demise as laid in the avowry. *Alexander v. Harris*, 4 Cranch, 298.

2. (Jan., 1830.) Ejectment to recover a lot of land, being the first division lot laid out to the right of the society, in the town of Pawlet. The plaintiffs are described in the writ as "The Society for the Propagation of the Gospel in Foreign Parts, a corporation duly established in England, within the dominions of the king of the United Kingdom of Great Britain and Ireland, the members of which society are aliens, and subjects of the said king." The defendants pleaded the general issue of not guilty. The general issue admits the competency of the plaintiffs to sue in the corporate capacity in which they have sued. *The Society, &c. v. Pawlet*, 4 Pet. 480.

3. If the defendants meant to insist on the want of a corporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar. Pleading to the merits has been held by this court to be an admission of the capacity of the plaintiffs to sue. The general issue admits, not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring. *Ib.*

4. (Jan., 1845.) A defendant in ejectment cannot protect himself by setting up the record in a prior chancery suit between the same parties, by which the plaintiff in the ejectment had been ordered to convey all his title to the defendant in the ejectment, but in consequence of the party being beyond the jurisdiction of the court, no such conveyance had been made. *Hickey v. Stewart*, 3 How. 750.

5. And this is so, although the court of chancery, in following up its decree, had legally issued a *habere facias possessionem*, and put the defendant in ejectment in possession of the land. *Ib.*

6. (April, 1817.) To a *scire facias* to revive a judgment in ejectment for the term and damages, the defendant cannot plead a conveyance of the premises to the lessor of the plaintiff, subsequent to the judgment. *Lessee of Penn v. Klyne*, Pet. C. C. 446.

7. (Dec., 1872.) An equitable defense to an action of ejectment cannot be permitted in the United States Circuit Court. The party seeking it must file his bill in chancery. *Butler v. Young*, 1 Flipp. 276.

8. (Dec., 1864.) Under the Oregon Code, a defendant in ejectment cannot avail himself of an estate in the premises, in himself or another, as a defense, unless the fact is pleaded. *Hall v. Austin*, Deady, 104.

9. A detailed statement of matters which might be evidence in support of a plea of title in the defendant is not a proper or sufficient plea of such title, and will be stricken out, on motion, as redundant. *Ib.*

10. An alleged equitable interest or right in the defendant, in an action of ejectment, is no defense to such action. *Ib.*

11. Sec. 72 of the Oregon Civil Code, which gives the defendant a right to plead as many several defenses to an action as he may have, is similar to 4 Anne, ch. 16, sec. 4, allowing double pleas, and should be similarly construed, so as to permit the defendant to plead inconsistent or contradictory defenses to the same action. *Ib.*

12. (Feb., 1870.) An equitable title is no defense to an action for possession by the holder of the legal title. *Stark v. Starr*, 1 Sawyer, 15.

13. The Oregon Code (226) does not allow a defendant in ejectment to defeat the plaintiff by giving in evidence any estate in himself or another in the property in controversy, unless the same be pleaded in his answer. *Ib.*

14. (May, 1870.) A defendant in ejectment should state in his answer the nature and duration of the estate he claims in the premises, if any, but not the evidence of it. (Oregon Code, 226, 227.) *Fitch v. Cornell*, 1 Sawyer, 156.

15. An exhibit is no part of a pleading in an action at law. A record or instrument should be stated in a pleading either according to its tenor or legal effect. *Ib.*

16. (April, 1876.) In an action to recover the possession of real property, a statement in the answer, of the grounds upon or means by which the defendant claims to be the owner of the property, is irrelevant, and may be stricken out on motion. *Wythe v. Myers*, 3 Sawyer, 595.

17. An allegation in the answer to the effect that the defend-

ant derives title to the premises from the administrators of W. H. Willson, it not appearing that said Willson was ever seised or possessed of the property, is frivolous, and may be stricken out on motion. *Ib.*

18. An allegation that the administrators of said Willson conveyed the premises to defendant's grantors on March 30, 1859, "in obedience to an order of the Probate Court of Marion County" of March 29, 1859, may be stricken out as frivolous and irrelevant, — it not appearing therefrom that said order was duly or lawfully made, or that such court had authority to make the same. *Ib.*

19. The defendant may allege in his answer that he is the owner of the premises in controversy; but if he couples such allegation with a statement of the grounds of his title, from which it does not appear that he is such owner, the matter may be stricken out as sham. *Ib.*

20. (April, 1877.) A plea stating that the defendant is in possession as assignee of an unsatisfied mortgage, but which does not allege that he entered with the assent of the mortgagor, is frivolous, but not sham or redundant. *Witherell v. Wiberg*, 4 Sawyer, 232.

21. The nature and duration of an estate, license, or right to the possession, how pleaded within the meaning of sec. 316 of the Oregon Civil Code. *Ib.*

Plea. In Writ of Right.

1. (Feb., 1814.) If the demandant demands against any tenant more land than he holds, he may plead non-tenure as to the parcel not holden; but the writ shall abate only as to the parcel whereof non-tenure is pleaded, and admitted or proved. *Green v. Liter*, 8 Cranch, 230.

2. The act of Virginia of 1786, reforming the method of proceeding in writs of right, did not vary the rights or legal predicament of the parties as they existed at the common law. It did not therefore change the nature and effect of the pleadings; and, notwithstanding that act, the tenant shall have the full benefit of the ordinary pleas in abatement. *Ib.*

3. Under the act of Virginia of 1786 the tenant may, at his election, plead any special matter in bar, in a writ of right, or give it in evidence on the mise joined. *Ib.*

4. A better subsisting adverse title in a third person is no defense in a writ of right. *Id.*

5. (Feb., 1817.) In a writ of right brought under the statute of Kentucky, where the demandant described his lands by metes and bounds, and counted against the tenants jointly, it was held that this was matter pleadable in abatement only, and that, by pleading in bar, the tenants admitted their joint seisin, and lost the opportunity of pleading a several tenancy. *Liter v. Green*, 2 Wheat. 306.

6. The tenants could not, in this case, severally plead, in addition to the mise or general issue, that *neither the plaintiff, nor his ancestor, nor any other under or from whom he derived his title to the demanded premises, were ever actually seised or possessed thereof, or of any part thereof*; because it amounted to the general issue, and was an application to the mere discretion of the court, which is not examinable upon a writ of error. *Id.*

7. *Quære*: Whether the tenants could plead the mise severally, as to the several tenements held by them, parcel of the demandant's premises, without answering or pleading anything as to the residue. *Id.*

Plea. In Writ of Entry.

1. (Oct., 1846.) When amended in proper form, *non-tenure* is a bad plea to such a declaration [in a writ of entry to foreclose a mortgage], whether put in by the mortgagor or any other person in possession, who is sued. *Fiedler v. Carpenter*, 2 Woodb. & M. 211.

2. To most real actions, *non-tenure* is, in Massachusetts, a good plea, either in bar or abatement; though in some states and in England it is good only in abatement. *Id.*

Plea. In Action for Libel.

1. (Nov., 1858.) In an action of libel, if the defendant intends to rely on the truth of that which he has published, either in bar of the action or in mitigation of damages, he must plead it specially; he cannot give in evidence the truth of the imputation, without pleading such truth as a justification. *Barrows v. Carpenter*, 1 Cliff. 204.

2. Where the charge is general in its nature, the defendant, in

a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff; but irrelevant matter will not vitiate, even on special demurrer. *Ib.*

3. It is sufficient if the defendant's plea answer the whole substance of the plaintiff's declaration. *Ib.*

4. The plea is required to state the substantial facts which constitute the elements of the charge, when it is general. *Ib.*

5. (Nov., 1866.) A special plea which sets up several defenses to a cause of action is bad. *Cook v. Tribune Association*, 5 Blatchf. 352.

6. A special plea must contain one good defense to all that it professes to answer. *Ib.*

7. Where a declaration is founded on a libel charging the plaintiff personally as corrupt and dishonest, a special plea to it, which imputes criminality only to the clerks and employés of the plaintiff, is bad. *Ib.*

8. Where a declaration is founded on a libel charging the plaintiff to be a full-blown scoundrel and knave, and not fit to be trusted with half a million of money, and that, if intrusted, he would convert it to his own benefit, and thereby commit felony, a special plea setting up that the plaintiff knowingly falsified the books of his office as postmaster, to defraud the government, and a special plea, setting up that the plaintiff coerced his clerks to subscribe to and support a newspaper of which he was proprietor, are bad, as containing no defense to the libel. *Ib.*

9. Where a declaration is founded on a libel charging that the plaintiff, if intrusted with public moneys, would commit the offense of embezzlement, a special plea to it, setting up that the plaintiff has committed the offense of embezzlement, is bad, as containing no defense to the libel. *Ib.*

10. Where a declaration is founded on a libel charging that the plaintiff, while postmaster, by natural affinity, gathered about him scamps, and wilfully and corruptly employed them to steal the public money, and that, under the conduct or rule of the plaintiff, as postmaster, and while he held the office, it became a den of thieves, a special plea, setting up that the plaintiff, as postmaster, had the appointment of his clerks and other employés, and that they, in the course of their employment and business, abstracted letters from the office, broke them open, and stole the contents, is bad, as containing no defense to the libel. *Ib.*

11. (July, 1867.) A plea of justification must be as broad as the libel, and answer every material part of the declaration. *Smith v. Tribune Co.*, 4 Biss. 477.

12. It is not necessary that one particular plea answer the whole libel, if the whole is answered by the different pleas. The defendant may justify separately and distinctly; but in such a case, the pleas should purport to answer only the particular charges. *Ib.*

13. It is not a good plea that the plaintiff was a public man, a lecturer and speaker, and professed to be an educator of the public, and that the defendant, a public journal, made the publication complained of with good intent, having reason to believe it to be true. A journal has no right to make specific charges against a man unless they are actually true; and honesty of motive is not a sufficient defense. *Ib.*

14. Plea of not guilty puts in issue the question whether the proof supports the innuendoes. *Ib.*

Plea. In Confiscation.

1. (Oct., 1865.) The bar to an action provided in sec. 6 of the act of July 17, 1862 (12 Stat. 591), commonly known as the Confiscation Act, applies only to property seized under the act. A plea which does not allege that the property was seized under the act is bad. *Elgee's Adm'r v. Lovell*, Woolw. 102.

2. A plea based on the act of March 3, 1863 (12 Stat. 820), relating to abandoned property, which does not aver that the property had been taken in a district which had been declared in insurrection, is bad. *Ib.*

3. The plea must exclude the idea of any special property in the plaintiff, with a present right of possession in him, in order to be good. *Ib.*

Plea. Statute of Limitations.

1. (Feb., 1803.) *Quære*: Whether the Statute of Limitations can be given in evidence on *nil debet*. *Lindo v. Gardner*, 1 Cranch, 343.

2. (Feb., 1825.) Although the statutes of limitation do not apply, in terms, to courts of equity, yet the period of limitation which takes away a right of entry, or an action of ejectment, has

been held by analogy to bar relief in equity, even where the period of limitation for a writ of right or other real action had not expired. *Elmendorf v. Taylor*, 10 Wheat. 152.

3. (Jan., 1832.) A bill was filed in 1808, for the purpose of obtaining the legal title to certain lands in Kentucky, and afterwards new parties were made defendants in an amended bill filed in 1815. Until these parties had so become defendants, and parties to the bill, the suit cannot be considered as commenced against them. The Statute of Limitations will avail the new defendants at the period when the amended bill was filed; and they are not to be affected by the proceeding during the time they were strangers to it. *Miller v. M'Intyre*, 6 Pet. 61.

4. Where the Statute of Limitations is pleaded at law or in equity, and the plaintiff desires to bring himself within its savings, it would be proper for him, in his replication, or by an amendment of his bill, to set forth the facts specially. *Ib.*

5. The courts in Kentucky and elsewhere, by analogy, apply the Statute of Limitations in chancery to bar an equitable right, when at law it would have operated against the grant. This principle has been well established and generally sanctioned in courts of equity. *Ib.*

6. At law the statute operates where the conflicting titles are adverse in their origin; and no reason is perceived against giving the statute the same effect in equity. *Ib.*

7. (Jan., 1835.) Statutes of limitation are applied by courts of equity in all cases where at law they might be pleaded. *Coulson v. Walton*, 9 Pet. 62.

8. (Jan., 1838.) Courts of equity are no more exempt from obedience to statutes of limitation than courts of common law. *Bank of United States v. Daniel*, 12 Pet. 33.

9. (Jan., 1846.) Although courts of equity generally adopt the statutes of limitation, yet, in a case of actual fraud, they will grant relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or become known to the party whose rights are affected by it. *Michoud v. Girod*, 4 How. 503.

10. (Jan., 1850.) Where a defendant in ejectment aliens the property in dispute, whilst the proceedings are pending, a possession by the vendee will not justify a plea of the Statute of Limitations. *Walden v. Bodley*, 9 How. 34.

11. (Jan., 1850.) Where the cause of action accrued in the State of Mississippi, and suit was brought upon it in the State of Alabama, a plea of the Statute of Limitations of Mississippi was not a good plea; but the same was demurrable, and the court sustained the demurrer. *Townsend v. Jemison*, 9 How. 407.

12. The rule is, that the Statute of Limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the statute of *lex loci contractus* cannot. *Ib.*

13. (Dec., 1853.) A statute of Mississippi, passed in 1846, declares that no record of any judgment, recovered in a foreign court, against a citizen of that state, shall be received as evidence after the expiration of three years from the time of the rendition of such judgment without the limits of the state.

This statute has no application to judgments rendered before its passage. Hence, where it was pleaded as a defense in a suit brought upon a judgment recovered in Louisiana, in 1844, the plea was bad and a demurrer to it sustained. *Murray v. Gibson*, 15 How. 421.

14. (Dec., 1857.) Where the Statute of Limitations imposes a bar upon certain species of contracts after three years, and upon others after two years, and the plea did not show that the contract in question was of the latter class, the plea was bad. *Lyon v. Bertram*, 20 How. 150.

15. (Oct., 1878.) The United States, whether named in a state statute of limitations or not, is not bound thereby; and when it sues in one of its own courts, such a statute is not within the provisions of the Judiciary Act of 1789, which declare that the laws of the states, in trials at common law, shall be regarded as rules of decision in the courts of the United States, in cases where they apply. *United States v. Thompson*, 8 Otto, 486.

16. (Oct., 1817.) The Statute of Limitations of New Hampshire (which is, in this respect, a transcript of the statute 21 Jac. 1, ch. 16) does not apply as a bar to an action of debt upon such statutable provision, for it is not founded upon any contract or lending without specialty. *Bullard v. Bell*, 1 Mason, 243.

17. (Oct., 1820.) A plea of the Statute of Limitations of the state, where a contract is made is no bar to a suit brought in a foreign tribunal to enforce that contract. But a plea of the Statute of Limitations of the state where the suit is brought is a

good bar. Principles of the *lex fori* discussed and examined. *Le Roy v. Crowninshield*, 2 Mason, 151.

18. (Oct., 1821.) Neither the general Statute of Limitations nor the Statute of Limitations of Massachusetts, as to executors and administrators, binds the United States in a suit in the Circuit Court; and, of course, neither can be pleaded in bar of such suit. *United States v. Hoar*, 2 Mason, 311.

19. (May, 1870.) A plea setting up the Statute of Limitations of the State of New York is a good plea in bar to an action for the infringement of letters-patent, brought in this court. *Rich v. Ricketts*, 7 Blatchf. 230.

20. (Oct., 1830.) If the Statute of Limitations is pleaded, and plea overruled, it cannot be again put in by the same parties or their privies. *Fisher v. Rutherford*, Baldw. 188.

21. (Oct., 1842.) The Statute of Limitations of the state where the suit is brought must be pleaded, and not the statute of any other state. It is the law of the forum. *Egberts v. Dibble*, 3 McLean, 86.

22. (Oct., 1842.) Where there is a bar under the Statute of Limitations it should be pleaded. *Johnson v. United States*, 3 McLean, 89.

23. (Oct., 1844.) A plea of the Statute of Limitations is not favored in law. In the exercise of their discretion, the court will not give leave to file this plea out of time, especially where there has been negligence and there is no pretense of merits. *Reed & Mix v. Clark*, 3 McLean, 480.

24. (May, 1848.) Where the Statute of Limitations has run against a judgment, it may be pleaded to a *scire facias* to revive the judgment. *Simpson v. Lassalle*, 4 McLean, 352.

25. (June, 1850.) The Statute of Limitations does not run against the government, nor is it chargeable with delays, so as to raise a presumption of payment. *United States v. Williams*, 5 McLean, 133.

26. (Oct., 1850.) The Statute of Limitations of Ohio does not bar an action on a judgment. *Todd v. Crumb*, 5 McLean, 172.

27. A judgment is not an agreement, contract, or promise in writing, nor is it in a legal sense a specialty. *Ib.*

28. Nor is a judgment barred by the provision that four years shall be a bar to all actions not enumerated in the statute. *Ib.*

29. It would be inconsistent with the policy of the statute to

bar a judgment in four years, while fifteen years are required to bar a promise in writing. *Ib.*

30. (Oct., 1872.) Where the plaintiff, in an action to recover land, relies upon title acquired by virtue of an adverse possession for the period prescribed by the Statute of Limitations, but alleges his seisin generally in his complaint, without setting out the statute, or the nature of his title, the defendant need not plead an exception to the statute upon which he relies, but may upon the trial show by evidence that he is within the exception, without pleading it. *Palmer v. Low*, 2 Sawyer, 248.

Plea. PUIS DARREIN CONTINUANCE.

1. (Jan., 1839.) It seems that a plea of *puis darrein continuance* is considered as a waiver of all previous pleas; and the cause of action is admitted to the same extent as if no other defense had been urged than that contained in the plea. *Wallace v. M'Connell*, 13 Pet. 137.

2. (Dec., 1863.) According to the system of pleading and practice in common-law cases which prevails in the courts of California, and which has been adopted by the Circuit Court of the United States in that state, a title acquired by the defendant in ejectment, after issue joined in the action, can only be set up by a supplemental answer in the nature of a plea *puis darrein continuance*. *Hardy v. Johnson*, 1 Wall. 371.

3. (Oct., 1840.) A plea *puis darrein continuance*, properly verified and filed within the rules of the court, will not be set aside on motion. *Spafford v. Woodruff*, 2 McLean, 191.

4. The facts alleged in the plea show that it has been filed in good faith; and the allegations must be denied by a replication, or admitted by a demurrer. *Ib.*

5. The filing of this plea waives all prior issues. *Ib.*

6. (April, 1846.) A plea *puis darrein continuance* admits the plaintiff's cause of action, displaces all previous pleas and defenses, and the defendant must stand on that alone. *Wisdom v. Williams & Blevins*, Hempst. 460.

7. (April, 1867.) The defendant having surrendered the office in controversy to a person duly authorized to receive it, since the filing of the answer, is entitled to file a supplemental answer, setting up this fact as a plea *puis darrein continuance*. *United States v. Avery*, Deady, 205.

8. (Nov., 1876.) Where, in an action to recover land, the plaintiff conveys to a stranger the premises in controversy *pendente lite*, under the Code of Procedure of the State of California, the action may be prosecuted to judgment in the name of the original party; and such conveyance cannot be set up by way of supplemental answer, to defeat a recovery of the possession. *French v. Edwards*, 4 Sawyer, 125.

9. Supplemental answers are in the nature of pleas *puis darrein continuance* under the former practice, and, like such pleas, should be interposed at the first opportunity after coming to the knowledge of the parties. *Ib.*

10. Where, pending an action, matter has arisen constituting a good technical, though an inequitable, defense, which the defendant, having notice, has for several years neglected to plead, one trial having intervened, the court, after such delay, in the exercise of its discretion, will, on the ground of laches, refuse leave to file a supplemental answer setting up such matter as a defense. *Ib.*

Replication. In Actions at Law.

1. (Feb., 1805.) If the defendant plead the bankruptcy of the indorser in bar, a replication stating that the note was given to the indorser, *in trust for the plaintiff*, is not a departure from the declaration, which alleges the note to have been given by the defendant for value received. *Wilson v. Codman*, 3 Cranch, 193.

2. (Jan., 1830.) In the correct order of pleading it is necessary that the facts of the plea should be traversed by the replication, unless matter in avoidance be set up. It is not sufficient that the facts alleged in the replication be inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea. *United States v. Buford*, 3 Pet. 12.

3. (Dec., 1863.) Declaration avers that the defendant had agreed that stock of a particular railroad in Indiana should be worth a certain price at a certain time, and in a certain place; and the plea sets up that, under a statute of Indiana, the stock of the railway named was merged and consolidated *by the consent of the party suing* with a second railway named, so forming "one joint-stock company of the said two corporations," under a corporate name stated. It was held that the plea was good, and that a replication which tenders issue upon the destruc-

tion of the first company, and upon the fact that its stock is destroyed, rendered worthless, and of no value, traverses a conclusion of law, and is bad. *Clearwater v. Meredith*, 1 Wall. 25.

4. Such a plea as that just mentioned contains two points, and two points only, which the plaintiff can traverse, — the fact of consolidation and the fact of consent; and these must be denied separately. If denied together, the replication is double, and bad. *Ib.*

5. (Dec., 1869.) This view is not altered by the fact that the replication to the plea setting up the Statute of Limitations averred that the appeal was “*duly*” made, its date not being set forth, the rejoinder first setting forth the date of the appeal and of the decision of it. *Braun v. Sauerwein*, 10 Wall. 219.

6. The effect of such a replication (which might have been demurred to), was only to aver that the statute was suspended for a time, nothing more being well pleaded by it. *Ib.*

7. (Dec., 1871.) The replication of *de injuria*, interposed to a special plea justifying the seizure and conviction of property sued for by one as collector of internal revenue, under an assessment against the plaintiff, duly made by the assessor of the district, and certified to him, puts in issue the material averments of that plea. It throws upon the defendant the burden of proving so much of the plea as constitutes a defense to the action. *Erskine v. Hornbach*, 14 Wall. 613.

8. The effect of the replication *de injuria* considered upon the authorities. However regarded, its sufficiency to put the material averments of the plea in issue cannot be raised after verdict. *Ib.*

9. (Oct., 1876.) In an action against it, upon a policy of life insurance, which provided that it should be null and void if the insured died by suicide, “sane or insane,” the company pleaded that he “died from the effects of a pistol wound inflicted upon his person by his own hand, and that he intended, by inflicting such wound, to destroy his own life.” *Held*, that a replication setting up that “at the time when he inflicted said wound, he was of unsound mind, and wholly unconscious of his act,” is bad. *Bigelow v. Berkshire Life Ins. Co.*, 3 Otto, 284.

10. (Nov., 1812.) It is a good replication to a plea of the Statute of Limitations that the plaintiff is a foreigner, and has never been within the limits of the state where the suit is brought. *Chomqua v. Mason*, 1 Gall. 342.

11. (May, 1824.) To a plea of the Statute of Limitations it is not a good replication that a suit for the same demand was commenced in a court in another state, and discontinued within six years. *Delaplaine v. Crowninshield*, 3 Mason, 329.

12. The commencement of a suit, to defeat the Statute of Limitations, must be the same suit to which the plea is pleaded. *Ib.*

13. (Oct., 1828.) In New Hampshire, in an action on the case for a deceitful representation in a sale, the Statute of Limitations was pleaded in bar. The plaintiff replied that there was a fraudulent concealment of the deceit until within six years. It was *held* that the replication was a good answer to the plea. *Sherwood v. Sutton*, 5 Mason, 143.

14. (Oct., 1846.) A replication to such a plea [general performance of the conditions of a bond to secure a faithful performance of various duties of a secretary and treasurer of a private association], assigning as a breach that the principal in the bond received a sum of money of the association, and did not use it, or account for it, or pay it over to the association, as was his duty, is not double. The various facts introduced relate to one breach as to the money, and constitute together but one charge, for which the principal is held responsible and his sureties, and are not separate and independent matters. *Jackson v. Rundlet*, 1 Woodb. & M. 381.

15. (Sept., 1822.) A judgment had been recovered by the United States, for a penalty, which was afterwards remitted. The marshal, to whom an execution was issued, had made a levy, but on being served with a warrant of remission redelivered the goods to the debtors. An action was thereupon brought against him, in the name of the United States, for the moiety of the penalty allowed to the officers; but the declaration alleged no interest in them, but only in the United States. The defendant pleaded the remission. The plaintiffs replied the interest of the officers. On special demurrer, *held* to be a departure. *United States v. Morris*, 1 Paine, 209.

16. (Sept., 1853.) Under sec. 14 of the act of July 4, 1836 (5 Stat. at Large, 123), an action at law for the infringement of a patent may properly be brought in the name of the patentee, in behalf of a licensee under him, who is damaged by the infringement.

Where, in an action so brought, the defendant sets up a re-

lease from the patentee, a replication is proper, setting up the license, the bringing of the suit for the benefit of the licensee, notice to the defendant of the license and its recording prior to the release, want of power in the patentee to give the release, and that it was given without the licensee's authority or consent. *Goodyear v. McBurney*, 3 Blatchf. 32.

17. When and on what terms leave will be granted to file an amended replication setting up those matters. *Ib.*

18. (March, 1867.) The provisions contained in sec. 100 of the Code of Procedure of New York (Laws of 1851, ch. 479), as to the time limited for commencing actions, considered, in reference to their applicability to foreign corporations. *Blossburg & Corning Railroad Co. v. Tioga Railroad Co.*, 5 Blatchf. 387.

19. Under that section of the code, the most appropriate form of replication to a plea of the Statute of Limitations, pleaded by a foreign corporation, is to allege, in proper technical language, and with the requisite certainty of time and place, the fact that the defendants were out of the state at the time the cause of action accrued, and continued out of the state down to the time of the commencement of the suit. *Ib.*

20. An allegation in the replication that they were out of the state when the cause of action accrued is, however, a sufficient legal answer to the plea of *actio non accrevit infra sex annos*. *Ib.*

21. An allegation in the replication that they were and are a corporation existing under the laws of another state, and that they were not and are not a corporation existing under any law of New York, is not a sufficient answer to such plea, because it fails to aver that the defendants were a foreign corporation before and at the time the cause of action accrued, and does not allege that they had never been a corporation under the laws of New York. *Ib.*

22. (April, 1817.) A replication to the plea of the Statute of Limitations, which stated that the debt arose on an account between merchant and merchant, and that the plaintiff was beyond sea, was bad for duplicity. *Craig v. Brown*, Pet. C. C. 443.

23. (April, 1806.) Double pleading. Action on a bond for the payment of certain sums of money at Amsterdam. Plea, that the money was paid. Replication, that the sum paid was not accepted in satisfaction by the agents of the plaintiffs; that

the sum was not paid on the day appointed ; and that damages and interest for non-payment were not paid. Adjudged, that this replication was bad, for duplicity. *United States v. Gurney*, 1 Wash. 446.

24. (April, 1823.) Action by the assignee of a bail-bond. Plea, *comperuit diem*, as appears by the record. Replication, *nul tiel record*. This forms an issue to the court. *Bobysall v. Oppenheimer*, 4 Wash. 388.

25. When the defendant pleads a record of the same court, the replication of *nul tiel record* concludes with a verification, and a day is given to the parties to have judgment. If the plea be of a record of another court, the replication may either conclude by giving the defendant a day to bring in the record, or with an averment and prayer of debt and damages, in which latter case there must be a rejoinder reasserting the existence of the record. *Ib.*

26. (May, 1839.) Where a verdict has been rendered against the plaintiff, and a judgment thereon has been entered, it is a bar to a suit for the same cause of action. And a replication that the evidence was wholly insufficient to establish the claim, or that no evidence was offered or received by the court, will not avoid the bar. *Ramsey & Vattier v. Herndon*, 1 McLean, 450.

27. The plaintiff should have suffered a nonsuit, or moved for a new trial. *Ib.*

28. (May, 1840.) Two affirmative facts in a plea and replication may be so contradictory, the one to the other, as to make an issue ; as, where the plea averred diligence in the prosecution of a suit, and the replication charged negligence. *Walker v. Johnson*, 2 McLean, 92.

29. In such case the replication would have been more formal if it had negatived the affirmation of diligence, in the plea, and concluded to the country. *Ib.*

30. The replication, in charging negligence and concluding with a verification, is wholly irregular, and cannot be sustained. *Ib.*

31. (July, 1846.) A replication is defective, to a plea of discharge in bankruptcy, which does not state the debt sued for to have been placed on the schedule. *Hood v. Spencer*, 4 McLean, 168.

32. (May, 1849.) The replication is not good which does not

answer the plea. To a plea of the Statute of Limitations the plaintiff replies that he lived in another state. This is not an exception within the statute. *Jones & Hardy v. Hays*, 4 McLean, 521.

33. (April, 1869.) To a suit on a promissory note, defendant pleaded in abatement the pendency of a suit in the state court. Plaintiff replied that, since the filing of the plea, the suit had been dismissed. *Held*, a good replication. *Chamberlain v. Eckert*, 2 Biss. 124.

Rejoinder. In Actions at Law.

1. (May, 1843.) A rejoinder must answer the replication. It must tender an issue on a single point. If double, it is demurrable. *United States v. Cumpton & Coleman*, 3 McLean, 163.

Demurrer. In Actions at Law.

1. (Feb., 1809.) Upon demurrer, the judgment of the court must be against the party who commits the first error. *United States v. Arthur*, 5 Cranch, 257.

2. (Jan., 1836.) It is an established rule in demurrers that, although the pleading demurred to may be defective, the court will give judgment against the party whose pleading was first defective in substance. *Sprigg v. Bank of Mt. Pleasant*, 10 Pet. 257.

3. (Jan., 1840.) A demurrer to a *scire facias* raises only questions of law on the facts stated in the writ of *scire facias*; no evidence is heard by the court on the demurrer; and consequently there is no presumption against the judgment on which the writ issued from lapse of time. *Walden v. Craig*, 14 Pet. 147.

4. (Jan., 1841.) By the Revised Code of Mississippi, 614, any number of breaches may be assigned; and when a demurrer shall be joined in any action, no defect in the pleadings shall be regarded by the court, unless specially alleged as causes of demurrer. A case having come to the Supreme Court by writ of error from the district of Mississippi, the modes of proceeding in that state govern the pleadings. *United States v. Boyd*, 15 Pet. 187.

5. (Jan., 1843.) Where the plea is bad, and the demurrer is

to the plea, the court, having the whole record before it, will go back to the first error. *United States v. Linn*, 1 How. 104.

6. (Jan., 1845.) A demurrer reaches no further back than the proceedings remain *in fieri*, or under the control of the court. *Dickson v. Wilkinson*, 3 How. 58.

7. (Jan., 1849.) A general demurrer by the defendant, assigning reasons why the plaintiff should not recover, must be considered and treated as a special demurrer, which is an objection for defects in form. *Tyler v. Hand*, 7 How. 573.

8. In this case none of the reasons are valid as objections to a matter of form; but the court, nevertheless, will examine them as if brought forward to sustain a general demurrer. *Ib.*

9. Where bonds were given to the President of the United States and his successors in office, for the use of the orphan children of certain Indians, and the declaration so averred, it was not a good cause of demurrer to allege that they were taken without authority of law. They were valid instruments, though voluntarily given, and not prescribed by law; and as the demurrer admitted the facts stated in the declaration, the defendant was estopped from contesting the right of the obligee to sue. *Ib.*

10. So, also, it was not a valid reason to say, in support of the demurrer, that the bonds were given without consideration; and if there was any illegality in the transaction, it should have been pleaded in bar. *Ib.*

11. Where the defendant demurred, and assigned as a reason that the place of abode of the plaintiff or his right to sue was not set forth in the declaration, it was demurring in abatement, and the judgment of the court, if the demurrer be overruled, will be final for the plaintiff. *Ib.*

12. It is not a good ground (of demurrer) for the defendant to say that the plaintiff has shown no title to the bonds. It is not a good objection to a matter of form or substance. *Ib.*

13. Nor was it a good ground of demurrer to say that the *cestui que use* was not named in the declaration. The demurrer admits that the recital of the use in the declaration was correct; and it was not necessary for the plaintiff to set out the individual uses when the uses were general in the bonds. *Ib.*

14. (Dec., 1857.) A demurrer only admits facts which are well pleaded. *Commercial Bank v. Buckner*, 20 How. 108.

15. (Dec., 1858.) Where it appeared from the record that a

party sold land to a railroad company, the price of which was paid in the stock of the company, guarantied by certain persons to be at par after a named time; and suit was brought upon this written contract, the case does not appear to be open to a demurrer by the defendants; and the judgment of the court below sustaining such a demurrer must be reversed. It is an original contract, and, being declared on as such, the plaintiffs are entitled to judgment. *Hill v. Smith*, 21 How. 283.

16. (Dec., 1858.) The decision at the present term in the case of *Hill v. Smith* again affirmed. *Clearwater v. Meredith*, 21 How. 489.

17. (Dec., 1859.) The statutes of Mississippi provide that no plea of *non est factum* shall be admitted or received, unless the truth thereof shall be proved by oath or affirmation.

A plea of that kind was filed without the affidavit, and demurred to by the plaintiff.

Although upon the general principles of pleading a demurrer only calls in question the sufficiency of what appears on the face of the pleading, and does not reach the preliminary steps necessary to be taken to put it upon file, yet, as the state courts where such a statute exists have held that the plea of *non est factum* is demurrable, if there be no affidavit, and the course of practice in the Circuit Court conforms to the state practice, this court also holds that such a plea is demurrable. *Bell v. Vicksburg*, 23 How. 443.

18. (Dec., 1866.) A plea of fraud in obtaining a judgment sued upon cannot be demurred to generally, because not showing the particulars of the fraud set up. Going to a matter of form, the demurrer should be special. *Christmas v. Russel*, 5 Wall. 291.

19. (Dec., 1870.) Under the act of July 13, 1866 (14 Stat. at Large, 142), which requires promissory notes to be stamped, making them void only when the stamp is omitted with intent to defraud the government of the stamp duty, a fraudulent omission cannot be taken advantage of on demurrer. *Campbell v. Wilcox*, 10 Wall. 421.

20. (Oct., 1874.) When the record of a case, a judgment in which is sued upon, shows that an attachment was issued in it, and laid upon property appraised at a less sum than the judgment was given for, a demurrer which makes, in virtue of the

attachment, a defense of payment and satisfaction is not good. *Maxwell v. Stewart*, 22 Wall. 77.

21. (Oct., 1876.) The English rule, that the Statute of Limitations cannot be set up by demurrer in actions at law, does not prevail in the courts of the United States sitting in Wisconsin. *Chemung Canal Bank v. Lowery*, 3 Otto, 72.

22. The distinction between actions at law and suits in equity has been abolished by the code of that state; and the objection that suit was not brought within the time limited therefor, if the lapse of time appears in the complaint, without any statement to rebut its effect, may be made by way of demurrer, if the point is thereby specially taken. If the plaintiff relies on a subsequent promise, or on a payment to revive the cause of action, he must set it up in his original complaint, or ask leave to amend. *Ib.*

23. (Oct., 1876.) Under the Code of Practice of Missouri, if any one of the defenses set up in the answer is a bar to the plaintiff's right to recover, a demurrer to the whole answer must be overruled. *County of Dallas v. MacKenzie*, 4 Otto, 660.

24. A county in Missouri, sued on certain coupons attached to bonds alleged to have been issued by it, denied in its answer the plaintiff's ownership for value; and, for further defense, averred that no orders authorizing the issue of such bonds were ever made by the proper county court, but that two of the justices thereof fraudulently and corruptly, but not as a court, made a certain other order, upon conditions which were not complied with. It further averred that such bonds were fraudulently and corruptly issued, and without authority. No copy of the bonds was filed with the plaintiff's complaint. The plaintiff demurred to the answer. *Held*, that the demurrer must be overruled. *Ib.*

25. (Oct., 1878.) Where bonds issued by a municipal corporation, having lawful authority to issue them upon the performance of certain conditions precedent, refer upon their face to such authority, and there is printed on their back a copy of an ordinance declaring such performance, it is not error, in an action against the corporation by an innocent holder of them, to sustain a demurrer to a special plea tendering an issue as to the authority of the corporation to issue them, or as to matters of fact contained in the recital of such ordinance. *Nauvoo v. Ritter*, 7 Otto, 389.

26. (Oct., 1878.) Conclusions of law are not admitted by a demurrer. *United States v. Ames*, 9 Otto, 35.

27. (Oct., 1846.) Duplicity and all defects in form, in pleading, can be taken advantage of only by special demurrer. A special demurrer is distinguished from a general one by pointing out specifically the causes for it. *Jackson v. Rundlet*, 1 Woodb. & M. 381.

28. After a demurrer, though it is a general rule that judgment must be rendered against him who commits the first fault in the pleadings in the whole case, yet the fault must be one that is bad on general demurrer, and one not cured by a verdict, and one not discovered by the court and desired to be amended so as to present the merits properly. In these last cases, judgment will be to reverse the decision below, and remand the case for amendment and a new trial, instead of rendering judgment for the opposite side. *Ib.*

29. (Oct., 1854.) If there be one good plea on the record, and a demurrer be filed, alleging that "the several pleas" are not sufficient, this will be intended to be taken to all the pleas, and must be overruled. *Brown v. Duchesne*, 2 Curt. C. C. 97.

30. (April, 1826.) If a plea which purports to answer all the breaches in the declaration is a good answer to some of them only, the objection cannot be taken advantage of on error, but on special demurrer only. *United States v. Willard*, 1 Paine, 539.

31. (June, 1828.) In covenant, when several breaches are assigned, some of which are sufficient and others not, the defendant should only demur to such as are bad; and if he demur to the whole declaration, judgment must be given against him. *Gill v. Stebbins*, 2 Paine, 417.

32. (June, 1828.) Upon demurrer to a plea in abatement, the court will look back to the first fault in pleading; and if the declaration is bad, judgment must be against the plaintiff. *Bockee v. Crosby*, 2 Paine, 432.

33. (March, 1832.) On demurrer to several pleas, if any one of them, going to the whole merits of the case, is well pleaded, and contains a full and sufficient answer, it will entitle the defendant to judgment. *Vermont v. Society, &c.*, 2 Paine, 545.

34. (April, 1846.) Where a plaintiff brought eleven *quittam* actions for penalties against the same defendant, the defendant having demurred to the declaration in each case, and the pleadings in all being alike, a motion by the plaintiff that the

demurrer in one of the cases be argued, and that the others abide its event, and all proceedings in them be stayed meanwhile, was denied. *Ferrett v. Atwill*, 1 Blatchf. 151.

35. Upon issues of law, the party bringing a multiplicity of suits must take the responsibility of meeting them in the usual way. *Ib.*

36. (Nov., 1846.) Where it is assigned as cause of demurrer to a declaration that it is not properly entitled, but the defect is not pointed out until the argument, and is then alleged to consist of a variance between the declaration and the writ, the court cannot act upon it on such a suggestion. *Wilder v. McCormick*, 2 Blatchf. 31.

37. Variances between the declaration and the writ cannot be taken advantage of on general demurrer. *Ib.*

38. (March, 1867.) Objections to the replication for not alleging time and place, and for duplicity, can be taken only by special demurrer. *Blossburg & Corning Railroad Co. v. Tioga Railroad Co.*, 5 Blatchf. 388.

39. On demurrer by the defendants to the plaintiff's surrejoinder, judgment was given for the plaintiff, because the defendants, in their rejoinder, committed the first fault in pleading. *Ib.*

40. (March, 1873.) A variance between the writ and the declaration cannot be taken advantage of by a demurrer. *Wilkinson v. Pomeroy*, 10 Blatchf. 524.

41. A count in assumpsit for a breach of promise of marriage, and a count in tort to recover damages for deceit, cannot be joined, and the defect can be reached by demurrer. *Ib.*

42. An objection that a declaration shows that the cause of action is barred by the Statute of Limitations cannot be taken by demurrer. *Ib.*

43. (May, 1880.) In a suit against a town on coupons cut from bonds of the town, the complaint¹ did not show that the application to the county judge for the bonding of the town was made after the passage of the act, the proceedings prescribed by which it was claimed, on demurrer to the complaint,¹ had not been followed. *Held*, that the question whether the act had been complied with could not be considered on the demurrer. *Pettit v. The Town of Hope*, 18 Blatchf. 180.

44. (April, 1817.) If the declaration does not set forth a proper case, and in correct form, the defendant may avail himself

¹ Practice according to New York Code.

of these defects by demurrer. But, if a sufficient case be stated, then it is incumbent on the plaintiff to prove it; and if he fail to do so, he is not entitled to a verdict. *Bas v. Steel*, Pet. C. C. 406.

45. (Oct., 1817.) When objections merely formal are stated as causes of demurrer, the party taking them is entitled to the benefit of such exceptions, when they are well founded. *Lockington v. Smith*, Pet. C. C. 466.

46. (Oct., 1819.) A demurrer in a case proceeded on, under the civil law, does not prevent the party who demurred controverting the facts confessed in the demurrer, and compelling the opposite party to prove them. *Crawford v. The William Penn*, 3 Wash. 484.

47. (April, 1823.) Action by the Postmaster-General against a deputy postmaster and his sureties, on the bond executed by them. The sureties plead that the plaintiff did not, as he was bound by law to do, call upon the deputy to settle his accounts, or cause suits to be commenced against him for not so settling them, and paying the balance due by him; nor did he notify the sureties of the defaults of the deputy, but *fraudulently*, and in violation of his duty to the United States, and to the sureties, neglected to bring such suits, and to give such notice. The plaintiff demurred generally. The demurrer to the plea admitting the fraud stated in it, the plaintiff cannot recover. *Postmaster-General v. Ustick et al.*, 4 Wash. 347.

48. (May, 1822.) A demurrer is in its nature a plea to the action, and will not be considered as a plea in abatement, though the special causes alleged for demurring be matter of abatement. The court will disregard those special causes, and considering the demurrer independently of them, will decide upon it as if they had not been inserted in it. *Furniss v. Ellis*, 2 Brock. 14.

49. (May, 1877.) Where, under the decision of the United States Supreme Court, in *New York Life Insurance Company v. Statham et al.* (3 Otto, 240), a declaration framed before this decision is held to be demurrable, the court will, in its judgment sustaining the demurer, take care that it shall not be in prejudice of the plaintiff's right to amend, so as to claim the equitable value of the policy of insurance arising from premiums paid before the forfeiture of the policy by non-payment of the premiums accruing after the commencement of the civil war. *Owen v. New York Life Ins. Co.*, 1 Hughes, 322.

50. (May, 1878.) Demurrers were filed in the Circuit Court, on various grounds, to the petition of the plaintiff, and were sustained by the court. The cause was taken by writ of error to the Supreme Court, by which the judgment of the Circuit Court was reversed and the cause remanded. *Held*, that the defendants should not be allowed to file in the Circuit Court further demurrers to the plaintiff's petition. *Hitchcock & Co. v. City of Galveston*, 3 Woods, 269.

51. (April, 1859.) A demurrer is well taken to pleas which commence by assuming to answer the whole declaration, and conclude by admitting the plaintiff's right to recover a part. *King v. American Transportation Co.*, 1 Flipp. 2.

52. (May, 1841.) A demurrer filed by the plaintiff to a plea of defendant will test the goodness of the declaration. *United States v. Spencer*, 2 McLean, 405.

53. (Oct., 1842.) A demurrer extends to the first error in pleading. *Egberts v. Dibble*, 3 McLean, 86.

54. (July, 1843.) If a party partially states a deed which is defective, or contains matter qualifying the part stated, the defendant may crave oyer of the deed, and set forth the whole, and then demur. *Hobson v. McArthur's Heirs*, 3 McLean, 241.

55. A demurrer to the declaration raises the question of law, whether the plaintiff from the fact stated is entitled to recover. *Ib.*

56. (Oct., 1843.) If the plaintiff demur to the plea, the court should look at the first defect in pleading. *Bank of Illinois v. Brady*, 3 McLean, 268.

57. (Dec., 1843.) On a demurrer to any pleading, the court may go back to the first fault. *Greathouse v. Dunlap*, 3 McLean, 303.

58. A demurrer to a plea admits all the facts of the plea which are well pleaded. *Ib.*

59. (May, 1853.) A demurrer reaches the first defect in pleading. *United States v. Beard*, 5 McLean, 441.

60. (July, 1867.) A demurrer to a count [in a declaration for libel] must take the innuendoes as alleged. *Smith v. Tribune Co.*, 4 Biss. 477.

61. (Oct., 1870.) Where the general issue has been pleaded, a demurrer to a special plea cannot be carried back to the declaration. Having tendered an issue of fact, the defendant can-

not claim the benefit of a demurrer. *McDonald v. Orvis*, 5 Biss. 183.

62. (April, 1839.) A special demurrer may be filed in all actions in the courts of the United States. 1 Stat. 91. *Cage v. Jeffries*, Hempst. 410.

63. (July, 1855.) Objections to the form of a complaint must be availed of by special demurrer. *Teese v. Phelps*, McAll. 17.

64. (March, 1868.) Where a demurrer is taken to the whole *complaint*, if either count in the complaint is good, the demurrer must be overruled. *Parrott v. Barney*, Deady, 405.

PRACTICE IN CIVIL ACTIONS AT COMMON LAW.

Affidavit.

1. (Oct., 1833.) The defendants cannot put in new rebutting evidence to affidavits of the plaintiff, offered in reply to those first offered by the defendants. *Ames v. Howard*, 1 Sumn. 482.

2. (Oct., 1822.) On a rule on plaintiff to show his cause of action, who thereupon files a positive affidavit of the debt, the court will not order the party making the affidavit to be examined on oath in court; no ground appearing to the court to justify a suspicion that the debt was not due. *Champion v. Ross*, 4 Wash. 325.

3. (June, 1839.) An affidavit to hold to bail must be positive; and the indebtedment must be stated from the knowledge of the affiant. *Wright v. Cogswell*, 1 McLean, 471.

4. An affidavit that the affiant was informed and verily believes the defendant is indebted to the plaintiffs is insufficient. *Ib.*

5. The affiant must state more than the mere legal import of the instrument on which the action is brought. *Ib.*

6. (June, 1840.) An affidavit to hold to bail must state the indebtedness positively, and specify the exact amount due, leaving nothing to inference; otherwise it will be fatally defective, and the order allowing a *capias* will be vacated. *Robinson v. Holt*, Hempst. 426.

7. Affidavits to hold to bail must be strictly construed. *Ib.*

8. (June, 1847.) Justices of the peace, and masters in chancery of the State of Arkansas, are authorized to take affidavits, to

be used in the Circuit Court of the United States, in civil causes ; and affidavits so taken are as valid and effectual as if subscribed in open court. *Gray v. Tunstall*, Hempst. 558.

9. (April, 1855.) The facts in an affidavit for a continuance should be within the knowledge of the affiant. *Read v. Haynie*, Hempst. 700.

Altered Instrument.

1. (Jan., 1843.) A party who claims under an instrument, which appears on its face to have been altered, is bound to explain the alteration ; but not so when the alteration is averred by the opposite party, and it does not appear upon the face of the instrument. *United States v. Linn*, 1 How. 104.

Amendment.

1. (Feb., 1813.) In ejectment, the date of the demise in the declaration may be amended during the trial, so as to conform to the title. *Blackwell v. Patton*, 7 Cranch, 472.

2. (Jan., 1840.) When the court has given leave, on motion, to extend the term in a demise, and the amendment is specific, it is not necessary to interline it in the declaration. If leave to amend the declaration had been given generally, and the amendments had not been interlined, it would be different. *Walden v. Craig*, 14 Pet. 147.

3. After judgment, the parties are still in court, for all the purposes of giving effect to it. And in the action of ejectment, the court having power to extend the demise after judgment, the defendant may be considered in court, on a motion to amend, as well as on any other motion or order which may be necessary to carry into effect the judgment. In no correct sense is this power of amendment similar to the exercise of an original jurisdiction between parties on whom process has not been served. *Ib.*

4. (Jan., 1841.) The case having been brought up from the Circuit Court of Mississippi, on a writ of error, and the judgment of the Circuit Court, on the demurrer, in favor of the defendant, and against the United States, having been reversed by the Supreme Court, the case will be in the Circuit Court as if the demurrer had been overruled ; and will be subject to additional

pleadings, as an amendment of the present pleadings, according to the rules and practice of the Circuit Court, and on such terms as it may impose. *United States v. Boyd*, 15 Pet. 187.

5. (Jan., 1842.) Amendment. The defendant, in the Circuit Court of Mississippi, was sued and declared against as the administrator of Algernon S. Randolph. He entered his appearance to the suit, and, in person, filed a plea in abatement, averring that he was not administrator of Algernon S. Randolph, and that he was the only executor of Algernon S. Randolph. The plaintiff moved to amend the writ and the declaration, by striking out "administrator," &c., and inserting "executor." Leave was granted, and the amendment was made. *Held*, that there was no error in the Circuit Court in giving leave to amend. *Randolph v. Barrett*, 16 Pet. 138.

6. The power of the Circuit Court to authorize amendments, when there is anything in the record to amend by, is undoubted. In this case the defendant admitted by his plea that he was the person liable to the suit of the plaintiff; but averred that he was executor, and not administrator. Whether he acted in one character or the other, he held the assets of the testator or intestate in trust for the creditors; and when his plea was filed it became part of the record, and furnished matter by which the pleadings might be amended. *Ib.*

7. This amendment is not only authorized by the ordinary rules of amendment, but also by the statute of the United States of 1789, sec. 32. *Ib.*

8. (Jan., 1844.) The court below set aside the order arresting the judgment, a year after it was made, and allowed the verdict to be amended by entering the same *nunc pro tunc*, on the first count only. In this there was no error. *Matheson v. Grant*, 2 How. 264.

9. (Jan., 1850.) But when an amendment to the record was made by consent of counsel, in this court, which amendment set forth the jurisdiction, a mandate containing that amendment ought to have prevented any subsequent objection to the jurisdiction, in the Circuit Court. *Kennedy v. Georgia State Bank*, 8 How. 586.

10. (Dec., 1853.) Where there was a mortgage of land in the city of Pittsburg, Pennsylvania, the mortgagee caused a writ of *scire facias* to be issued from the Court of Common Pleas, there

being no chancery court in that state. There was no regular judgment entered upon the docket, but a writ of *levari facias* was issued, under which the mortgaged property was levied upon and sold. The mortgagee, the Bank of Pittsburg, became the purchaser. This took place in 1820.

In 1836, the court ordered the record to be amended, by entering up the judgment regularly, and by altering the date of the *scire facias*.

Although the judgment in 1820 was not regularly entered up, yet it was confessed before a prothonotary, who had power to take the confession. The docket upon which the judgment should have been regularly entered being lost, the entry must be presumed to have been made. *Slicer v. Bank of Pittsburg*, 16 How. 571.

11. Moreover, the court had power to amend its record in 1836. *Ib.*

12. (Dec., 1869.) An amendment by allowing, *nunc pro tunc*, an entry, omitted at the proper time by inadvertence, in the journal record of the clerk, of the issue of a writ of peremptory *mandamus*; and an amendment by the marshal to his return, so as to show that he had exhibited the original writ to the party served, allowed as matters of common practice. *Supervisors v. Durant*, 9 Wall. 736.

13. (Oct., 1875.) The power of amending a writ of error returnable to the Circuit Court is vested in that court as fully as it is in the Supreme Court, on writs of error returnable to it. *Semmes v. United States*, 1 Otto, 21.

14. The judgment of the Circuit Court ought not to be reversed for defects of form in the process returnable on error to that court, which are amendable by the express words of an act of Congress. *Ib.*

15. (Oct., 1876.) Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others. *Tilton v. Cofield*, 3 Otto, 163.

16. (Oct., 1879.) Where an action has been removed from a state court to the Circuit Court, the latter may, in accordance with the state practice, grant the plaintiff leave to amend his declaration by inserting new counts for the same cause of action as that alleged in the original counts. *West v. Smith*, 11 Otto, 263.

17. (Oct., 1880.) The court is authorized by sec. 954 of the Revised Statutes to allow, at any time during the trial, amendments in the pleadings; and where it has done so it must, in its discretion, determine whether the submission of the cause ought to be vacated. *Bamberger v. Terry*, 13 Otto, 40.

18. Where the plaintiff is permitted to amend his declaration so as to avoid a variance between it and the proofs, and it appears that neither the nature nor the merits of the issue are thereby changed, the defendant is not entitled to an order setting aside the submission of the cause for trial. *Ib.*

19. (Oct., 1838.) A party will be allowed to amend, before trial, his writ and declaration, by striking out the name of one of the defendants. *Tobey v. Claflin*, 3 Sumn. 379.

20. The courts of the United States are not implicitly bound by the practice and decisions of state courts, with regard to amendments. *Ib.*

21. (Oct., 1840.) The Judiciary Act of 1789, ch. 20, s. 32, gives no authority to the courts of the United States to make any amendments in judgments, except as to defects and want of form. *Albers v. Whitney*, 1 Story, 310.

22. The doctrine of the English courts in all cases of ordinary suits (excluding fines and recoveries) is that judgments and records are amendable only, (1) where the case is within the reach of some statute; and (2), where there is something to amend by. *Ib.*

23. At common law, no judgment was amendable after the term at which it was entered. *Ib.*

24. Where the name of a party was erroneously stated in the writ to be *James H. Alvers*, instead of *John H. Albers*, which was the true name, it was *held* that, as the misnomer was a mistake of *fact*, not apparent upon the record, and not to be amended by any matter apparent in any part of the record, the court were not authorized to make the amendment. *Ib.*

25. (May, 1842.) In this case the original declaration was upon a refusal to deliver up, upon an execution, goods valued at \$7,000; and, upon leave to amend granted by the court, a new count was introduced, claiming them at \$2,200; and it was *held* that, although it was within the discretion of the court to allow the new count, yet, since the line of defense was thereby materially changed, it ought only to be granted upon payment of de-

fendant's costs, up to the time when the offer to file such count was made. *Pierce v. Strickland*, 2 Story, 292.

26. (Oct., 1846.) In either case, all proper amendments in the pleadings will be allowed on the new trial; and the service [of writ of review, or of notice] must be on some administrator of the deceased who has taken out letters in this state [Maine]. *Clark v. Sohier*, 1 Woodb. & M. 368.

27. (Oct., 1846.) An amendment may be allowed of a declaration, after a special plea, replication, and demurrer, provided the cause of action remains the same, and costs are paid arising from the demurrer. *Fiedler v. Carpenter*, 2 Woodb. & M. 211.

28. (April, 1878.) Courts of record have power at any time, as well after as during the term at which any entry is made, of their own motion, or at the suggestion of any party interested, and without notice to any one, to correct the mistakes and supply the omissions of their clerks or recording officers, so as to make the record conform to the truth of the case. *Gilman v. Libbey*, 4 Cliff. 447.

29. They are the exclusive judges of the necessity and propriety of so amending and correcting their records, and of the sufficiency of the proofs offered to show the necessity of such action. *Ib.*

30. (Nov., 1846.) But even if such an objection [of variance between the entitling of the declaration and the writ] were properly raised, an amendment of the error would be allowed. *Wilder v. McCormick*, 2 Blatchf. 31.

31. (Nov., 1863.) Where the declaration in an action of trover claimed as damages a sum less than that for which a verdict was rendered for the plaintiff, and he moved, after the verdict, to amend the declaration, by increasing the damages claimed to a sum larger than the verdict, and the defendant did not object to the amendment, provided a new trial should be granted,—*Held*, that the amendment ought to be allowed, but only upon condition that the plaintiff relinquish the verdict and pay the costs of the trial, and consent to a new trial. *Elting v. Campbell*, 5 Blatchf. 183.

32. (Jan., 1870.) In this case, which was a suit against a collector of customs for the return of duties paid under protest, on commissions and charges, sundry words found in the record of the verdict, and which it appeared were not a part of the verdict as rendered, but were inserted by a clerical mistake, were ex-

punged by the court, and sundry other words, not found in the record of the verdict, and which it appeared were part of the verdict as rendered, but were omitted by a clerical mistake, were inserted by the court. *Tomes v. Redfield*, 7 Blatchf. 139.

33. The proper manner of adjusting a verdict for excessive duties on charges, stated. *Ib.*

34. (Jan., 1877.) An omission to allege sufficiently, in a complaint, that the defendant is a citizen of a different state from that of the plaintiff is amendable. *Kelsey v. Pennsylvania Railroad Co.*, 14 Blatchf. 89.

35. (Aug., 1879.) In an action for damages for publishing a libel, the answer omitted to deny statements in the complaint as to the manner in which the plaintiff was damaged, and as to the amount of the damages sustained. The defendant was allowed to amend the answer by denying such statements, on the ground that the omission to deny them ought to have been regarded by the plaintiff as inadvertent. *Goodyear Dental Vulcanite Co. v. White*, 17 Blatchf. 5.

36. (April, 1808.) By the provisions of the act of Congress, a variance, which is merely matter of form, may be amended at any time. *Scull v. Bridle*, 2 Wash. 200.

37. The proceedings were amended by the recognizance of bail, and the name of the defendant in the recognizance inserted in the declaration. *Ib.*

38. (April, 1822.) Amendments of declarations in ejectment, by adding a count stating a demise under a new title, are not allowed. *Den v. Babcock*, 4 Wash. 199.

39. (Nov., 1853.) If the record shows anything to amend by, the court may amend its own records at the distance of fifteen years, as in this case, or at any distance of time, without any notice to the parties, and without their presence. The action of the court in this respect cannot be questioned by another court, even upon error. *Cromwell v. The Bank of Pittsburg*, 2 Wall. Jr. 570.

40. (May, 1822.) The plaintiff's counsel filed a memorandum with the clerk, and the latter, in filling up the writ, mistook the name of one of the plaintiffs. The clerk also drew the declaration, in which the same mistake occurred. Upon a motion to amend the pleadings, it was *held*: 1. That the memorandum of the counsel was a document by which the error in the writ might be amended, on the ground of clerical misprision. 2. That the

error in the declaration might also be amended, but not on the ground of clerical misprision. It is no part of the clerical duty to prepare the declaration for counsel. In such a case, the clerk must be regarded as the agent of the attorney, and the declaration is to be treated as if it had been drawn and filed by the attorney himself. Therefore, though the court should give leave to amend the declaration, when amended it must be considered as a new declaration, and the defendants should be permitted to plead *de novo*. *Furniss v. Ellis*, 2 Brock. 14.

41. (Nov., 1840.) A *feri facias* issued in the name of two plaintiffs, after one of them is dead, is irregular and defective; but such defect may be amended under the authority given by the thirty-second section of the act of 1789, ch. 20, if the matter be regularly brought before the court. *Lane v. Beltzhoover*, Taney's Dec. 110.

42. (March, 1876.) Where an action was brought in the name of A. for the use of B., and it appeared on the trial that before suit brought A. had assigned the claim to B., who therefore held the legal title, an amendment, under the Code of Georgia, was allowed after verdict, by striking out the name of A. from the petition. *Whitaker v. Pope*, 2 Woods, 463.

43. (Nov., 1831.) A demise may be extended after the judgment in the ejectment, so as to enable the plaintiff to realize the benefit of his judgment. *Legerwood v. Pickett*, 1 McLean, 143.

44. But this should never be done without notice to the persons in possession, who may show cause why the amendment should not be allowed. *Ib.*

45. (Dec., 1838.) This is an action of assumpsit. The declaration having been filed, the defendant filed his plea of *non assumpsit*, without annexing to it an affidavit, as the statute requires, that the instrument on which the action is brought was not executed by him. And a motion was made by Mr. Fox for leave to amend the plea by annexing such affidavit to it as the rule of the court, which adopts the statute, requires. [Leave to so amend was granted, at the costs of the defendant.] *Loving & Co. v. Fairchild*, 1 McLean, 333.

46. (June, 1839.) Where a writ is served on a person of a different name from the one against whom it was issued, and there is no appearance, the plaintiff cannot proceed. *Elliott v. Holmes*, 1 McLean, 466.

47. In such a case the writ may be amended by consent of parties, on the payment of costs. *Ib.*

48. (Dec., 1842.) A verdict may be amended where there is a mistake in form. *Jones v. Vanzandt*, 2 McLean, 612.

49. (Dec., 1843.) A demise in the name of a dead man will be stricken out on motion. *Doe, ex dem. Baylor, v. Neff*, 3 McLean, 302.

50. And so, if the lessor of the plaintiff be dead at the commencement of the suit. *Ib.*

51. (June, 1844.) By the common law, amendments were permitted, if there was anything to amend by. *Nelson v. Barker & Stewart*, 3 McLean, 379.

52. Anciently all amendments were required to be made at the term when the error occurred. *Ib.*

53. But now they may be made at any time before judgment, and, in some cases, afterwards. *Ib.*

54. A misnomer may be amended after plea in abatement. *Ib.*

55. The plea gives the matter by which to amend. But under the act allowing amendments, the declaration may be amended. *Ib.*

56. (Oct., 1844.) At common law an amendment might be made whilst the proceedings were in paper. *Brush & Durham v. Robbins*, 3 McLean, 486.

57. Amendments in England, under their statutes, constitute no rule for the courts in this country. *Ib.*

58. (June, 1847.) A very slight amendment of the declaration, which in no respect can affect the merits of the case, does not require a copy of the declaration to be served under the rule. The plea filed by the defendant required the amendment. *Spofford v. Ritten*, 4 McLean, 253.

59. (July, 1848.) A court has power to make amendments *nunc pro tunc*. *Sprague v. Litherberry*, 4 McLean, 442.

60. The case still being continued on the docket, and the counsel presumed to be in court, no notice of an amendment was necessary. *Ib.*

61. (June, 1850.) Amendments are granted to promote justice. In this respect the powers of the court are adequate, and they are liberally exercised. *Tiernan's Ex'rs v. Woodruff*, 5 McLean, 135.

62. It is not a sufficient cause to strike out an amendment because it introduces a new cause of action embraced by the suit. *Ib.*

Appearance.

1. (Feb., 1806.) An appearance of the defendant *by attorney* cures all antecedent irregularity of process. *Knox v. Summers*, 3 Cranch, 496.

2. (Jan., 1848.) Where a citizen of Virginia sued in the Circuit Court of Louisiana two persons jointly, one of whom was a citizen of Louisiana, and the other of Missouri, and an attorney appeared for both defendants, the citizen of Missouri is at liberty to show that the appearance for him was unauthorized. If he shows this, he is not bound by the proceedings of the court, whose judgment, as to him, is a nullity. *Shelton v. Tiffin*, 6 How. 163.

3. (Oct., 1873.) When a defendant has filed a plea to the merits, and afterwards, by leave of the court, withdraws his plea, that does not withdraw his appearance; and he is still in court so as to be bound personally by a judgment rendered against him in the action. *Eldred v. Bank*, 17 Wall. 546.

4. (Oct., 1873.) A withdrawal, "without prejudice to the plaintiff," of a general appearance entered by an attorney, for the defendant, means that the position of the plaintiff is not to be unfavorably affected by the act of withdrawal; that all his rights are to remain as they then stood. Hence, where there has been error in the beginning of an action, as, *ex gr.*, one of foreign attachment, by reason of want of notice required by statute to be given to the defendant, and an attorney appears generally for such defendant, and so cures the defect, the advantage thus given to the plaintiff is not taken away by a withdrawal declared to be "without prejudice" to him. And the court states that it does not intend to intimate that the result would have been different had the appearance been withdrawn unconditionally. *Creighton v. Kerr*, 20 Wall. 8.

5. (Oct., 1874.) A court will acquire jurisdiction of the person, in a suit originally commenced by an attachment *in rem*, if the party against whom the claim is set up voluntarily appears and submits himself to the jurisdiction, demurs, pleads, and goes to trial on issues made. *Maxwell v. Stewart*, 22 Wall. 77.

6. (Oct., 1877.) The appearance of counsel specially for a

corporation, and his moving to dismiss the petition of an individual creditor for the appointment of a receiver of its property, do not preclude him from subsequently appearing for the trustee of the bondholders, in proceedings to foreclose mortgages given by the corporation. *Shaw v. Bill*, 5 Otto, 10.

7. (May, 1823.) A., a citizen of New Hampshire, sued a corporation established by a statute in Connecticut, in the Circuit Court of New Hampshire; the corporation having entered a general appearance, it was *held* that the objection to the service under the eleventh section of the Judiciary Act of 1789, ch. 20, was waived. *Flanders v. Aetna Ins. Co.*, 3 Mason, 158.

8. (April, 1848.) Where, in such a suit [by an assignee in bankruptcy of a voluntary bankrupt, to recover a balance due from a principal to the bankrupt, as factor, at the time of the presentation of his petition in bankruptcy, under sec. 6, of the Bankrupt Act of Aug. 19, 1841 (5 Stat. at Large, 445)], the defendant acquiesces in its reference to an auditor, and appears before him and contests the claim, he cannot, on a writ of error, object that, in the court below, the case should have been tried by a jury. *Kelly v. Smith*, 1 Blatchf. 290.

9. (April, 1873.) In the case of a corporation aggregate no waiver of an objection to jurisdiction can be produced, by the fact that the corporation appears and pleads by attorney. *Cadle v. Tracy*, 11 Blatchf. 102.

10. (June, 1878.) An incorporated association of persons was sued as "The Albany and Canal Line." It waived process, and appeared by that name, and answered without objecting that it was improperly sued. *Held*, that it could not afterwards raise such objection. *Deems v. The Albany & Canal Line*, 14 Blatchf. 474.

11. (April, 1821.) To entitle the plaintiff to file a common appearance for the defendant, under the act of the assembly of Pennsylvania, of the 20th of March, 1724, the summons must have been served ten days before the return-day. But if it was not served that length of time, the writ is not to be dismissed, but the plaintiff must proceed regularly to enforce an appearance. *Smith v. Bohn*, 4 Wash. 127.

12. (April, 1866.) Where a co-defendant who resides in a district other than the one where suit is brought voluntarily appears and pleads to the suit jointly with the other defend-

ants, it is a waiver of any exception to the jurisdiction of the court. *McCloskey v. Cobb*, 2 Bond, 16.

13. (June, 1845.) Where parties not within the jurisdiction of the court appear voluntarily, the court can take jurisdiction. *M'Lean v. Lafayette Bank*, 3 McLean, 588.

14. (Jan., 1880.) A general appearance and consenting to a continuance waive irregularity in the notice. *Marye v. Strouse*, 6 Sawyer, 204.

Argument.

1. (Oct., 1806.) If there be a negative and affirmative plea, the plaintiff's counsel must begin and conclude on the negative issue; and the counsel for the defendant, in the affirmative; but both must, in the argument, confine themselves strictly to the issue they are discussing. *Vuyton v. Brenell*, 1 Wash. 467.¹

Arrest of Judgment.

1. (April, 1808.) After bail given, and plea pleaded, the defendant cannot arrest the judgment on the ground of misnomer. *Scul v. Briddle*, 2 Wash. 200.

Assessment of Damages. Writ of Inquiry.

1. (April, 1794.) Bradford then proposed settling the interest; but WILSON, Justice, observed that he had had more than one occasion to object to the courts interposing, in any form, to assess damages. In some states, he said, it had, indeed, grown into a practice; and the courts had, in that and perhaps in many other instances, done the business which ought to go to a jury. Lewis referred to a case in the Supreme Court of the United States, in which this point had been made, though not directly decided; but the judge said, it was not the foundation of the judgment of the court, and that, in his opinion, a writ of inquiry was the regular mode of proceeding.

It being suggested, however, that the usage in the state courts was to enter the judgment generally, and that the plaintiff must ascertain the debt, and issue execution at his own peril, that mode was adopted on the present occasion. *Armstrong v. Carson*, 2 Dall. 302.

¹ Foot-note.

2. (Feb., 1797.) *Third error assigned*: The damages ought not to have been assessed by the court.

BY THE COURT: We are unanimously of opinion that, under the laws and the practical construction of the courts of Rhode Island, the judgment of the Circuit Court ought to be affirmed. *Brown v. Van Braam*, 3 Dall. 344, 348, 356.

3. CHASE, Justice, observed that he concurred in the opinion of the court, but that it was on common-law principles, and not in compliance with the laws and practice of the state. *Ib.*

4. (Dec., 1851.) By the twenty-sixth section of the Judiciary Act, the courts have power to assess damages upon bonds, &c., and to render judgment for so much as is due according to equity, in cases of default or confession or demurrer. This section does not apply to a case heard on agreed facts. *Ives v. Merchants' Bank*, 12 How. 159.

5. (April, 1823.) Judgment on the issue of *nul tiel record* being rendered for the plaintiff, the court directed a writ of inquiry to issue in the original suit to assess the damages to which the plaintiff was entitled; the parties not agreeing to the sum due to the plaintiff, the judgment against the bail to remain as a security. *Bobyshall v. Oppenheimer*, 4 Wash. 388.

6. (Oct., 1824.) After judgment on the bail-bond for the penalty, if the real amount of debt due by the principal, and claimed by the plaintiff, be controverted, the court may direct a writ of inquiry in the original suit, to ascertain the sum due; or may direct it in the bail-bond suit; or may direct an issue to be made up and tried at bar. *Bobyshall v. Oppenheimer*, 4 Wash. 482.

Attorney.

1. (Feb., 1824.) It is unnecessary for an attorney or solicitor, who prosecutes a suit for the Bank of the United States, or other corporation, to produce a warrant of attorney under the corporate seal. *Osborn v. Bank of United States*, 9 Wheat. 738.

2. (Feb., 1826.) A counsel or attorney is not a competent witness to testify as to facts communicated to either by his client, in the course of the relation subsisting between them, but may be examined as to the mere fact of the existence of that relation. *Chirac v. Reinicker*, 11 Wheat. 280.

3. (Jan., 1834.) An attorney-at-law, in virtue of his general

authority as such, is entitled to take out execution upon a judgment recovered by him for his client, and to procure a satisfaction thereof by a levy on lands or otherwise, and to receive the money due on the execution; and thus to discharge the execution. And if the judgment debtor has a right to redeem the property sold under the execution within a particular period of time, by payment of the amount to the judgment creditor, who has become the purchaser of the property, there is certainly strong reason to contend that the attorney is impliedly authorized to receive the amount, and thus indirectly to discharge the lien on the land. At least, if (as is asserted at the bar) this be the common course of practice in the State of Tennessee, it will furnish an unequivocal sanction for such an act. *Erwin v. Blake*, 8 Pet. 18, 26.

4. (Dec., 1850.) The attorney who had recovered the judgment which was thus recovered and assigned was not at liberty to purchase it, when his client became sued, and execution was issued against him. *Stockton v. Ford*, 11 How. 232.

5. (Dec., 1855.) A purchase of an interest in property by an attorney, made after judgment has been obtained, is not forbidden by the laws of Louisiana. *McMicken v. Perin*, 18 How. 507.

6. (Dec., 1865.) On a question of marriage and legitimacy, an attorney who drew a will for the alleged husband, now deceased, in which the children of the connection set up as wedlock are described as the "natural children" of the testator, may, without violating professional confidence, testify what was said by the testator about the character of the children and his relations to their mother, in interviews between the testator and himself, preceding and connected with the preparation of the will. *Blackburn v. Crawfords*, 3 Wall. 176.

7. (Dec., 1867.) An attorney-at-law, having no power *virtute officii* to purchase for his client, at judicial sale, land sold under a mortgage held by the client, the burden of proving that he had other authority rests on him. *Savery v. Sypher*, 6 Wall. 157.

8. (Dec., 1870.) The attorney or solicitor, who is also counsel in a cause, has a lien on moneys collected therein, for his fees and disbursements in the cause, and in any suit or proceeding brought to recover other moneys covered by the same retainer. *In re Paschal*, 10 Wall. 483.

9. A motion to pay into court the moneys collected will not be granted; but the parties will be left to their action, if the attor-

ney is guilty of no bad faith or improper conduct, and has a fair set-off against his client. *Ib.*

10. A party has a general right to change his attorney ; and a rule for that purpose will be granted, leaving to the attorney the advantage of any lien he may have on papers or moneys in his hands as security for his fees and disbursements. *Ib.*

11. (Oct., 1873.) The power to disbar an attorney can only be exercised where there has been such conduct, on the part of the party complained of, as shows him to be unfit to be a member of the profession ; and before judgment disbaring him can be rendered, he should have notice of the grounds of complaint against him, and ample opportunity of explanation and defense. *Ex parte Robinson*, 19 Wall. 506.

12. (Oct., 1875.) An account or money demand having been delivered by its owners to a collection agency, with instructions to collect the debt, that agency transmitted the claim to an attorney, who, knowing the insolvency of the debtor, persuaded him to confess judgment. The money collected was transmitted to the collection agency, but never reached the creditors. Proceedings in bankruptcy were instituted against the debtor within four months after such confession, and were prosecuted to a decree. *Held*, that as the attorney was the agent of the collection agency which employed him, and not of the creditors, his knowledge of the insolvency of the debtor was not chargeable to them in such sense as to render them liable to the assignee in bankruptcy for the money collected on the judgment. *Quære* : Would they have been so liable had the money reached their hands? *Hoover v. Wise et al.*, 1 Otto, 308.

13. (Oct., 1879.) *Held*, 6. That counsel cannot be paid out of the fund in dispute [arising out of lands sold by the escheator in Virginia, and claimed by the next of kin of the deceased]. *Hauenstein v. Lynham*, 10 Otto, 483.

14. (Oct., 1824.) An attorney is bound to disclose to his client, if he has any adverse retainer which may affect his own judgment or his client's interest. But the concealment of the fact is not a necessary presumption of fraud. *Williams v. Reed*, 3 Mason, 405.

15. If a creditor has several debts, some of which are secured by mortgage and some not, it is not gross negligence to unite them all in a single suit at law, and so take a single judgment

therefor ; and if, in such case, the execution issuing on the judgment is satisfied in part only, a court of equity will apply the moneys received on the execution, in the first instance, to extinguish such parts of the debt and judgment as were not secured by mortgage. *Ib.*

16. A ratification of the proceedings of an attorney in a suit is not valid to bind the client, unless it is made with a full knowledge of all the material facts. *Ib.*

17. It seems that an attorney-at-law is not bound to be personally present, or personally to co-operate with the appraisers, who, under the laws of Maine, are authorized to set off real estate by appraisement, to satisfy an execution. *Ib.*

18. (Oct., 1815.) An attorney who enters an appearance in a suit, without authority, is answerable in damages for the injury he may thereby have occasioned the parties. *Field v. Gibbs*, Pet. C. C. 155.

19. (April, 1810.) If the defendant insist upon it, the plaintiff's attorney must file his warrant. *The King of Spain v. Oliver*, 2 Wash. 429.

Bill of Exceptions.

1. (Feb., 1807.) An exception may be taken to the opinion of the judge in his charge to the jury. *Smith v. Carrington*, 4 Cranch, 61.

2. (Feb., 1824.) It is not necessary that a bill of exceptions should be formally drawn and signed before the trial is at an end. The exception may be taken at the trial, and noted by the court, and may afterwards, during the term, be reduced to form, and signed by the judge. But in such cases it is signed *nunc pro tunc*, and purports, on its face, to be the same as if actually reduced to form and signed during the trial. It would be a fatal error if it were to appear otherwise. *Walton v. United States*, 9 Wheat. 651.

3. (Jan., 1830.) The law requires that a bill of exceptions should be tendered at the trial. If a party intends to take a bill of exceptions, he should give notice to the judge at the trial ; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to sign it after the term must be understood to be matter of consent between the parties, unless the judge has made an express

order in the term allowing such a period to prepare it. *Ex parte Bradstreet*, 4 Pet. 102.

4. (Jan., 1837.) In the ordinary course of things, on the trial of a cause before a jury, if an objection is made and overruled as to the admission of evidence, and the party does not take any exception, he is understood to waive it. The exception need not indeed then be put in form, or written out at large and signed; but it is sufficient if it is taken, and the right reserved to put it in form within the time prescribed by the practice or the rules of the court. *Poole v. Fleegee*, 11 Pet. 185.

5. (Jan., 1845.) Where a general objection is made in the court below to the reception of testimony, without stating the grounds of the objection, this court considers it as vague and nugatory; nor ought it to have been tolerated in the court below. *Camden v. Doremus*, 3 How. 515.

6. (Jan., 1848.) The statutes of Iowa provide a mode for taking bills of exceptions, by directing that they shall be tendered to the judge for his signature during the progress of the trial, although judges may, and often do, sign bills of exception, *nunc pro tunc*, after the trial. *Sheppard v. Wilson*, 6 How. 260.

7. Such is also the English practice under the Statute of Westminster, 2, and such is the practice recognized by this court. *Ib.*

8. Therefore, where a bill of exceptions was signed two years after the trial, the Supreme Court of Iowa were right in striking it out of the record. *Ib.*

9. (Dec., 1851.) Where an action of trespass *quare clausum fregit* was brought, and the defendants justified, and the court allowed the defendants, upon the trial, to open and close the argument, this ruling of the court is not a proper subject for a bill of exceptions. *Day v. Woodworth*, 13 How. 363.

10. (Dec., 1853.) It is not necessary that the bill of exceptions should be formally drawn and signed before the trial is at an end. But the exception must be noted then, and must purport on its face so to have been, although signed afterwards *nunc pro tunc*. *Turner v. Yates*, 16 How. 14.

11. (Dec., 1855.) A statute passed by the State of Illinois on 3d March, 1845, permits matters both of fact and law to be tried by the court, if both parties agree.

Where a case was tried in the Circuit Court of the United States, in which both parties agreed that matters of law and fact

should be submitted to the court, and it was brought to this court upon a bill of exceptions which contained all the evidence, this court will remand the case to the Circuit Court, with directions to award a *venire de novo*. *Graham v. Bayne*, 18 How. 60.

12. (Dec., 1857.) Exceptions must be taken or the points reserved whilst the jury are at the bar. *Barton v. Forsyth*, 20 How. 533.

13. (Dec., 1862.) An exception taken to the ruling of the court, before the retirement of the jury from the bar, may be drawn out in form, and sealed by the judge afterwards. *Dredge v. Forsyth*, 2 Black, 563.

14. The time within which it may be so drawn out and presented to the court must depend upon the rules and practice of the court and the judicial discretion of the presiding judge. *Ib.*

15. (Dec., 1862.) If an exception be seasonably taken and reserved, it may be drawn out and sealed by the judge afterwards, and the time within which it may be so drawn out and presented to the court must depend on the rules and practice of the court and the judicial discretion of the presiding justice. *Kellogg v. Forsyth*, 2 Black, 571.

16. (Dec., 1864.) The court reprehends severely the practice of counsel in excepting to instructions *as a whole*, instead of excepting, as they ought if they except at all, to each instruction *specifically*. Referring to *Rogers v. The Marshal* (1 Wall. 644), &c., it calls attention anew to the penalty which may attend this unprofessional and slatternly mode of bringing instructions below before this court; the penalty, to wit, that the exception to the whole series of propositions may be overruled, no matter how wrong some may be, if any *one* of them all be correct, and when, if counsel had excepted specifically, a different result might have followed. *Harvey v. Tyler*, 2 Wall. 328.

17. (Dec., 1866.) It is the duty of a party excepting to evidence to point out the part excepted to, so that the attention of the court may be drawn to it. Hence objections of a very general and indefinite nature to testimony taken under a commission, with interrogatories, and which do not point out, except in gross, the portions of the answers objected to, and which embrace matters clearly competent, will not be sustained. If the exception covers any admissible testimony, it is rightly overruled. *United States v. McMasters*, 4 Wall. 680.

18. (Oct., 1875.) Where conversations of a third party were admitted in evidence on the assurance of counsel that they expected to prove that such third party was the agent of the defendant, which, however, was not done, nor the attention of the court afterwards called to the subject, — *Held*, that, upon the hypothesis of the case submitted to the jury in the charge of the court, the evidence becoming immaterial, an exception to its admission was properly overruled. *Unitarian Society v. Faulkner*, 1 Otto, 415.

19. (May, 1816.) It is no ground for a bill of exceptions that a court refused to instruct the jury on a point of law, which was so stated that it involved an opinion on matters of fact, as where an opinion was prayed “under the circumstances of the case,” which were not found as facts. *United States v. Burnham*, 1 Mason, 57.

20. (Oct., 1828.) Where a bill of exceptions is taken at the trial, a motion for a new trial will not be entertained unless the bill of exceptions is waived. *Cunningham v. Bell*, 5 Mason, 161.

21. (Oct., 1847.) Where a statement is made and signed by the judge, as to the facts in the case and the rulings on them, it may be sufficient evidence of their truth. But this does not amount to a bill of exceptions so that a writ of error lies, unless it appears that the party objected at the trial to the rulings, and wished the exceptions noted and reduced to a bill. It must appear, further, that the exceptions were persisted in. *United States v. Jarvis*, 3 Woodb. & M. 217.

22. The seal to a statement verifying all the papers sent up may be sufficient, though not in the usual place for a bill of exceptions. *Ib.*

23. The proper form for a bill of exceptions is that in use under the Statute of Westminster the second, and not of a case saved by one judge for the whole court. *Ib.*

24. (Nov., 1847.) Exceptions, if to be relied on by a bill, should be so taken and notified at the trial. When taken at the trial, the court may allow them to be reduced to form afterwards, and subsequently filed *nunc pro tunc*. *Nicoll v. American Ins. Co.*, 3 Woodb. & M. 530.

25. However immaterial to the court may be the time when the exception is made, the successful party cannot be subjected to it except on legal principles. *Ib.*

26. (Sept., 1875.) Applications for leave to amend are generally addressed to the discretion of the court, and the ruling thereon is not generally the subject of exception or a writ of error. *McGlinchy v. United States*, 4 Cliff. 312.

27. (Dec., 1845.) Where prayers for instructions to the jury are made, and not complied with by the court, they are to be considered as refused. *Emerson v. Hogg*, 2 Blatchf. 1.

28. Exceptions will lie to the refusals of the court to give instructions when requested in like manner as to the instructions actually given. *Ib.*

29. (May, 1859.) Where, on a trial in an action at law, a verdict was given for the plaintiff, subject to the opinion of the court on a case to be made, and a case was then made containing the questions of law, and a reservation to either party of the right, after the decision of the court on the case, to turn the case into a bill of exceptions, and a motion for a new trial was then denied, and judgment entered for the plaintiff, and the defendant then sued out a writ of error to the Supreme Court, but through inadvertence the case was annexed to the record without changing it into the form of a bill of exceptions, and neither party observed the defect, and the case was argued in the Supreme Court on its merits, but that court noticed the defect and affirmed the judgment below, because there was no bill of exceptions, and no error on the face of the record, this court afterwards allowed the defendant to turn the case into a bill of exceptions, on payment of the costs in the Supreme Court. *Williamson v. Suydam*, 4 Blatchf. 323.

30. (Sept., 1877.) The rule stated, as to when a bill of exceptions may be signed and filed, and as to the circumstances under which a judgment will be vacated for the purpose of allowing a bill of exceptions which was not signed at the proper term to be subsequently signed and filed. *Eagle Mfg. Co. v. Draper*, 14 Blatchf. 334.

31. (Dec., 1877.) After a lapse of two and a half years, this court refused to allow a bill of exceptions to be signed and filed, no step looking to that end having been before taken, and a writ of error in the case being pending in the Supreme Court. *Herbert v. Butler*, 14 Blatchf. 357.

32. (Aug., 1880.) A motion in this case for leave to file and serve a bill of exceptions *nunc pro tunc* was denied because of

laches, the only excuse assigned therefor being the illness and poverty of the party. Judgment had been entered at a term which had expired. *Whalen v. Sheridan*, 18 Blatchf. 308.

33. The rules of practice under the New York Code of Procedure have no application to writs of error and bills of exception in the courts of the United States. *Ib.*

34. (Oct., 1880.) A motion for leave to file a bill of exceptions *nunc pro tunc* denied, on the ground that the only excuse offered for laches was the poverty of the plaintiff. *Whalen v. Sheridan*, 18 Blatchf. 324.

35. The system of review on writ of error, in a suit at law, established by the statutes of the United States, is so far a different procedure from that of the state courts of New York that the provisions of the state statute, embracing those of sec. 783 of the State Code of Civil Procedure, are not made, by sec. 914 of the Revised Statutes of the United States, to govern proceedings for such review. *Ib.*

36. Whether, after the allowance of a writ of error to remove a suit at law to the Supreme Court, this court could entertain such motion, *quære*. *Ib.*

37. (Nov., 1822.) Where a cause is removed from an inferior to a superior tribunal by writ of error, no fact not stated in the bill of exceptions will be noticed. *Pendleton v. United States*, 2 Brock. 75.

38. (Nov., 1853.) The court will not seal a bill of exceptions presented two years after the trial, unless satisfied that there was error in the instructions given to the jury. *Greenway v. Gaither*, Taney's Dec. 227.

39. (Nov., 1874.) A bill of exceptions which shows that the exceptions to the rulings of the court below were not taken at the trial, but were taken for the first time four days after the verdict and judgment, will not, as a matter of right, be considered by the court. *Strain v. Gourdin*, 2 Woods, 380.

40. A statement made by counsel for plaintiff in error of what he understood the evidence to be, on the trial of the cause in the court below, which is not made a part of the bill of exceptions, and is not verified by the signature of the judge, forms no part of the record, and no matter how formally certified by the clerk, will not, as a matter of right, be considered by the court on error. *Ib.*

41. (Oct., 1868.) On a writ of error, no question of fact can be re-examined ; only questions of law are subject to review.

Consequently, a bill of exceptions embodying the testimony in support of, and resistance to, an application for a bankrupt's discharge, which shows no question of law raised or decided on the trial, and an exception only to the final order granting the discharge, does not present a case for review on writ of error. *Ruddick v. Billings*, Woolw. 330.

42. (Jan., 1880.) Notwithstanding the rule of court requiring a bill of exceptions to be drawn up within ten days after the trial, a case may be excepted from its operation when it is just to do so. *Marye v. Strouse*, 6 Sawyer, 205.

Bill of Particulars.

1. (Oct., 1877.) Matters of evidence are not required to be stated in a bill of particulars. *Garfield v. Paris*, 6 Otto, 557.

2. (Oct., 1878.) Under sec. 3012 of the Revised Statutes of the United States, construed in connection with sec. 954, this court has power, in a suit for the recovery of duties alleged to have been erroneously or illegally exacted by a collector of customs, to allow a bill of particulars to be served after the expiration of thirty days after notice of the appearance of the defendant, and to allow a defective bill of particulars to be amended. *Pott v. Arthur*, 15 Blatchf. 314.

3. (March, 1876.) A bill of particulars appended to a petition to recover money paid as usury, which sets forth the usurious payments as general indebtedness for cash paid by the plaintiff to the defendant, is sufficient [Georgia]. *Whitaker v. Pope*, 2 Woods, 463.

Briefs.

1. (April, 1875.) Sec. 918 of the Revised Statutes gives to the Circuit Court power to regulate the practice therein, "as may be necessary or convenient for the advancement of justice and the prevention of delay in proceedings," provided such regulation is not inconsistent with any law of the United States or rule of the Supreme Court. *Held*, that under this authority the court might by general rule, or special order in a particular case, require parties to a cause submitted to it for decision to file printed

briefs, and might tax the reasonable expense of printing the brief of the prevailing party, against the losing party, as a necessary disbursement. *Neff v. Pennoyer*, 3 Sawyer, 335.

Certificate of Probable Cause.

1. (Dec., 1872.) The claimant of the goods [seized by a collector of internal revenue, as forfeited], after a trial [absolving them], where probable cause has been certified, ought to move the court for the necessary orders to cause the property to be returned to the rightful owners, if the court have itself omitted to make such an order. It is not the duty of either the marshal or collector to do so. *Averill v. Smith*, 17 Wall. 82.

2. (Oct., 1878.) A., a collector of internal revenue, seized certain whiskey belonging to B., for the condemnation and forfeiture whereof proceedings were afterwards, at the suit of the United States, brought in the proper court. The court rendered a judgment dismissing them; and "it appearing that the seizure, though improperly made, was made by his superior officer, the supervisor," ordered that a certificate of probable cause be issued to A. B. brought trespass against the supervisor. *Held*, 1. That the certificate was a bar to the suit. 2. That the motive of the court for granting it makes no part of the record, and should not have been recited therein. *Stacey v. Emery*, 7 Otto, 642.

3. (Nov., 1849.) Where the application for the certificate [of reasonable cause for seizure of a vessel for alleged violation of the navigation laws] was not made until more than two years and four months after the decision of the cause, and until after the claimant had brought suit against the collector for the seizure, — *Held*, that although the lapse of time was not a bar to the application, yet, as there had been laches in not making it until after the claimant had brought such suit and incurred consequent expenses, those costs must be paid him. *United States v. Ship Recorder*, 2 Blatchf. 119.

4. (Sept., 1877.) A judgment having been entered against a defendant, as a collector of customs, in a "charges and commissions" case, for duties overpaid, under protest, which duties had been paid into the Treasury by the defendant, and such judgment not having been paid by the Treasury Department, the plaintiff issued an execution against the property of the defendant. The

defendant applied to the court for a certificate, under sec. 989 of the Revised Statutes, that there was probable cause for the acts done by the collector, and for a stay of the execution. *Held*, that the application must be granted. *Cox v. Barney*, 14 Blatchf. 289.

5. Such certificate may be granted by a different judge from the one before whom the verdict was rendered. *Ib.*

6. It having been the practice of defendants in like cases not to ask for a certificate of probable cause until the judgment was about to be paid by the Treasury Department, no laches or delay can be alleged against a defendant for not applying for such certificate before the issuing of an execution. *Ib.*

Consolidating Actions.

1. (1870.) Where two actions against the same defendants, one for trespass to the person and the other for trespass to property, arose out of the same transaction and might have been joined, the court, instead of ordering them to be consolidated, directed that they be tried at the same time and before the same jury. *Holmes v. Sheridan*, 1 Dill. 351.

Construing Laws.

1. (Oct., 1875.) In construing an act of Congress, the court may recur to the history of the times when it was passed, in order to ascertain the reason for, as well as the meaning of, particular provisions in it; but the views of individual members in debate, or the motives which induced them to vote for or against its passage, cannot be considered. *United States v. Union Pacific Railroad Co.*, 1 Otto, 72.

Contempt of Court.

1. (Feb., 1812.) The courts of the United States have the power to fine for contempts, to imprison for contumacy, and to enforce the observance of their orders. *United States v. Hudson*, 7 Cranch, 32.

2. (Oct., 1873.) The act of Congress of March 2, 1831, entitled "An Act declaratory of the law concerning contempts of court," limits the power of the Circuit and District Courts of the

United States to three classes of cases: 1st, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; 2d, where there has been misbehavior of any officer of the courts in his official transactions; and, 3d, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. *Ex parte Robinson*, 19 Wall. 505.

3. The seventeenth section of the Judiciary Act of 1789, in prescribing fine or imprisonment as the punishment which may be inflicted by the courts of the United States, for contempts, operates as a limitation upon the manner in which their power in this respect may be exercised, and is a negation of all other modes of punishment. *Ib.*

4. (Nov., 1824.) An attachment is the usual process to bring a party into court, where he has not made a true return; and if he is present in court, no such process is necessary; but the court may pass an order directing him immediately to answer interrogatories. *United States v. Green*, 3 Mason, 482.

5. (June, 1852.) An application to the court to compel one of its officers to pay over money due from him, in his official capacity, is a proceeding as for a contempt; and the court has jurisdiction, under the act of Congress of March 2, 1831. *Matter of John T. Pitman*, 1 Curt. C. C. 186.

6. In such a proceeding the sworn answers of the officer are evidence in his favor. *Ib.*

7. (June, 1851.) The thirtieth section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 88), gives authority to this court to compel witnesses to attend before a commissioner, for examination *de bene esse*, in the same manner as to compel them to appear and testify in court. And upon due proof of service of a subpoena upon a witness, requiring his attendance before a commissioner, and the certificate of the commissioner that the witness did not attend before him, it is proper that an attachment should issue against the witness. *Ex parte Humphrey*, 2 Blatchf. 228.

8. But that statute does not apply to a witness who is casually absent from home, although he is found at a place more than one hundred miles from the place of trial of the cause, unless he is about going to sea, or is aged, infirm, &c. *Ib.*

9. Where an attachment is issued against such a witness, the

question of the authority of the commissioner, and of the regularity of the proceedings before him, is properly brought before the court by affidavit. *Ib.*

10. (Nov., 1853.) The practice stated as to issuing an attachment against a witness for his refusal to obey a subpœna issued by this court, requiring his appearance before a United States commissioner, to be examined, *de bene esse*, as a witness in a suit pending in another district, under sec. 30 of the act of Sept. 24, 1789 (1 Stat. at Large, 88), on the ground that he resides more than one hundred miles from the place of trial of such suit. *Ex parte Judson*, 3 Blatchf. 89.

11. On the motion for such an attachment, this court will not examine the question as to whether the foreign suit is a real or a fictitious one, or an amicable one, or as to the object of examining the witness, but will assume that the suit is carried on in the usual way. *Ib.*

12. (Dec., 1853.) On a motion for an attachment against a witness for refusing to answer a question put to him on his examination *de bene esse*, before a United States commissioner, on a *subpœna duces tecum*, as a witness in a suit pending in another district, under sec. 30 of the act of Sept. 24, 1789 (1 Stat. at Large, 88), it must be shown that the commissioner had jurisdiction in the matter, and that the witness resides more than one hundred miles from the place of trial of the action, and that the matter in regard to which the witness refuses to testify is material and relevant to the issue in the case. *Ex parte Peck*, 3 Blatchf. 113.

13. Where it appears that the subpœna for the attendance of the witness before the commissioner was issued without any preliminary evidence having been given before him, showing the case to be one in which a *de bene esse* examination could be lawfully had, the want of such proof will be a vital objection to the issuing of an attachment. *Ib.*

14. Although, on the trial of a case, a witness may be compelled, by subpœna, to produce, under oath, papers within his control, which are proved to be material to the questions in issue, yet Congress has provided a different mode for enabling the parties to a suit to obtain papers which are in the possession of a third person, and it is doubtful whether that object can be legally effected by the *de bene esse* examination of a witness out of court. *Ib.*

15. (Dec., 1853.) An attachment for contempt of court will not be granted unless a case of clear contempt is established. *In re Judson*, 3 Blatchf. 148.

16. When the contempt is not committed *in facie curiæ*, it must be proved by affidavits from persons who witnessed it. *Ib.*

17. Where a witness, on his examination before a commissioner of this court, *de bene esse*, under sec. 30 of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 88, 89), in a suit pending elsewhere, refused to answer a question put to him, and, on a motion to this court for an attachment against the witness for contempt, nothing appeared but the fact of such refusal, and the materiality of the evidence sought was not shown, — *Held*, that the attachment could not be granted. *Ib.*

18. The same rules must be applied to determining the propriety of compelling a witness to answer a particular question, on his examination *de bene esse* before a commissioner, under the act of 1789, that govern the court on the examination of a witness on a trial before the court. *Ib.*

19. (May, 1801.) Any publication, pending a suit, reflecting upon the court, the jury, the parties, the officers of the court, the counsel, &c., with reference to the suit, or tending to influence the decision of the controversy, is a contempt of the court, and punishable by attachment. *Hollingsworth v. Duane*, Wall. C. C. 77.¹

20. (May, 1801.) A rule upon a party to show cause why an attachment should not issue against him for a contempt must be served personally; but if he evades the service, or other circumstances render it proper, the court will order that service at his last place of abode shall be deemed sufficient. *Hollingsworth v. Duane*, Wall. C. C. 141.¹

21. (Oct., 1809.) It is not a contempt of court to serve a person while attending at the court as a party in a cause, or as a witness, with a summons. This privilege extends to exemption from arrest, and no further. *Blight's Executor v. Fisher*, Pet. C. C. 41.

22. It is a contempt of court to serve process, either of summons or *capias*, in the actual or constructive presence of the court. *Ib.*

23. (April, 1842.) Although this court is deprived, by the

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act of 2d March, 1831, of the power to punish as for a contempt of court, the publication, during trial, of testimony in a case, yet, having power to regulate the admission of persons, and the character of proceedings within its own bar, the court can exclude from within the bar any person coming there to report testimony during the trial. *United States v. Holmes*, 1 Wall. Jr. 1.

24. (1870.) Federal courts or judges cannot discharge persons from custody under process for contempt issued by a state court in the course of a suit pending therein, even though it relates to property of Indians, of which, under special treaties and acts of Congress, such state court has no jurisdiction. *Ex parte Forbes & Pucket*, 1 Dill. 363.

Continuance.

1. (April, 1795.) BY THE COURT: The act says, generally, that the court shall have power, "on motion and due notice thereof being given, to require the parties to produce books or writings," &c., without designating to whom the notice shall be given, the party himself or his attorney. But we will always keep the cause under our control for the purposes of substantial justice, and never suffer either party to be entrapped. If, for instance, notice is served on an attorney whose client lives at a great distance, this will always be deemed a sufficient reason to postpone the trial until a full opportunity has been afforded for the attorney's communicating the rule to the client. If, likewise, the court find that the deeds are actually on record, we will not indulge the party with a rule for producing them merely as a cheap mode of procuring evidence. The originals may sometimes indeed be necessary, for a special reason, detached from the evidence; but in that case the special reason must be assigned to the court. *Geyger v. Geyger*, 2 Dall. 332, 333.

2. (April, 1797.) Motion for continuance.

PETERS, Justice. If any delay had heretofore occurred by the defendant's conduct, I should have been disposed to have held him strictly to the performance of everything by which it was in his power to procure the testimony of the witness. The act of Congress, however, appears to be rather harsh; and if no excuse like the present could be admitted, it would be declaring, in effect, that whenever witnesses reside more than one hundred

miles from the court, their depositions must be indispensably taken.

IREDELL, Justice. It is not a sufficient reason for forcing this cause to trial, in the absence of a material witness, that the act of Congress authorized his deposition to be taken. Courts of justice have always been desirous to obtain *viva voce* testimony where it was practicable. . . . *Symes v. Irvine*, 2 Dall. 383.

3. (Jan., 1834.) Under the sixty-fifth section of the Duty Act of 1799, where a bond has been given for duties, and errors in the calculation thereof are alleged on affidavit, at the first term to which suit has been brought on the bond, a *delay* of one term is allowed for the purposes of examination and correction. Where there is a real defense to the claim on the bond, an opportunity to obtain evidence by a *continuance*, according to the circumstances of the case, must be given. *United States v. Phelps*, 8 Pet. 700.

4. (Jan., 1848.) A continuance, relating back, may be entered at any time to effect the purposes of justice. *Sheppard v. Wilson*, 6 How. 260.

5. (Oct., 1833.) It is the practice of this court, in all cases of surprise at the trial, by new matter proving a ground material to either party, and clearly made out by affidavit, to postpone or continue the cause. If the party interested, however, elects to go on with the cause, relying upon other matters, he is understood to waive the matter of surprise; and he cannot take his chance with the jury, and, if unsuccessful, then move the matter as a ground for a new trial. *Ames v. Howard*, 1 Sumn. 482.

6. (May, 1801.) To obtain the further continuance of a cause, where a rule has been taken for trial or *non pros.*, the plaintiff must show some precise legal or strong equitable ground; and it is not sufficient to allege that the attorney, in fact or law, from attention to other necessary concerns, could not be prepared. *Hammond's Lessee v. Haws*, Wall. C. C. 1.¹

7. (May, 1801.) Where the execution of a commission to examine witnesses has been prevented by the acts or omission of the prosecutor or his agents, the defendant is entitled to a continuance, even if he be guilty of *laches* in taking out the commission. *United States v. Duane*, Wall. C. C. 5.¹

8. (May, 1801.) Where the defendant, by mistake, gives

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notice of a new ground of defense, to repel which the plaintiff sends away his principal witness to obtain testimony, who is still absent, though defendant offers to take the old ground, yet the plaintiff is entitled to a continuance, notwithstanding a rule to try or *non pros.* has been taken. *Echeveria v. Nairac*, Wall. C. C. 29.¹

9. (May, 1801.) The defendant, swearing at the moment of trial that he had heard of one who could be a material witness for him is no ground for postponing the trial, though he swears positively by a supplemental affidavit, but without any new information, that the witness is material. *Hollingsworth v. Duane*, Wall. C. C. 46.

10. (April, 1816.) What is and what is not good ground for an application for a continuance of a cause. *The King of Spain v. Oliver*, Pet. C. C. 217.

11. The continuance of a cause, by consent or by order of the court, while it is under a rule for trial or *non pros.*, does not discharge the rule; and such a rule continues until it is expressly discharged. *Ib.*

12. (April, 1808.) The court continued the cause on the application of the defendant, a witness being absent in New Jersey, on the ground that a state magistrate cannot issue process for defendant's witnesses into another state. *United States v. Little*, 2 Wash. 159.

13. (April, 1808.) The court continued the cause, upon the application of the defendant, he being an administrator, and having a few days before discovered among the intestate's papers material evidence. *Hourquibee v. Gerard's Adm'r*, 2 Wash. 164.

14. (Oct., 1808.) Where the plaintiffs had filed a new count to their declaration, to which no plea had been entered, the court granted a continuance of the cause. *Le Roy v. The Delaware Ins. Co.*, 2 Wash. 223.

15. (Dec., 1838.) A motion was made for a continuance of this cause, founded on the affidavit of one of the defendant's counsel, who was sick and unable to attend the court. The affidavit stated that the affiant was the first counsel engaged by the defendant, had appeared as his counsel in the same case in the state court, and was intimately acquainted with the grounds of defense; that he had possession of the papers, &c.; and that he

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did not believe justice could be done in the cause, under present circumstances, in his absence. [Continuance granted at the costs of defendant.] *Lessee of Shultz v. Moore*, 1 McLean, 334.

16. (June, 1839.) Where a party moves for a continuance on account of absent witnesses, and states what he expects to prove by such witnesses, if the facts stated would not be admissible in evidence, the motion must be overruled. *Warburton v. Aken*, 1 McLean, 460.

17. (May, 1874.) Sec. 34 of the Oregon Civil Code, which limits the time to one year within which the court may allow an action to be continued by the administrator, applies to actions in the Circuit Court of the United States. (17 Stat. 197, s. 5.) *Barker v. Ladd*, 3 Sawyer, 44.

Costs.

1. (May, 1801.) A defendant cannot be compelled to proceed to trial until payment of the costs of a former action between the same parties, for the same cause, which had been *non prossed*. *Hurst's Lessee v. Jones*, 4 Dall. 329.

2. (Feb., 1805.) Costs are not to be awarded against the United States. *United States v. Hooe*, 3 Cranch, 73.

3. (Feb., 1805.) In Virginia, if the first *ca. sa.* be returned *non est*, the second may include the costs of issuing both. *Peyton v. Brooke*, 3 Cranch, 92.

4. (Feb., 1817.) It was also held that a joint judgment against the tenants for the *costs* as well as the *land*, was correct. *Liter v. Green*, 2 Wheat. 306.

5. (Feb., 1823.) On a bill of interpleader, the plaintiffs are in general entitled to their costs out of the fund. Where the money is not brought into court they must pay interest upon it. *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268.

6. (Jan., 1832.) In addition to the fact shown by the bill and answer, that the controversy between the parties as to the title to the lands was not abandoned by the defendants,—a fact which is entitled to some influence in the question of costs,—the bill prays that the defendants might be enjoined from committing waste while they retained possession of the premises; that a receiver might be appointed, and that an account of rents be taken. These are proper objects of equity jurisdiction. If

they had been accomplished when the decree was pronounced, the bill might have been dismissed, but not so far as is disclosed by the record, with costs. The defendants are not entitled to costs. *Peirsoll v. Elliott*, 6 Pet. 95.

7. (Jan., 1846.) Nor can a decree or judgment be entered against the government for costs. *United States v. McLemore*, 4 How. 286.

8. (Jan., 1847.) If a judgment for costs be given against the United States, by the court below, it must be reversed, as the United States are not liable for costs. *United States v. Boyd*, 5 How. 30.

9. (Dec., 1853.) As a matter of practice, this court decides that it is proper for the Circuit Courts to allow costs to be taxed *nunc pro tunc*, after the receipt of the mandate from this court. *Sizer v. Many*, 16 How. 98.

10. (Dec., 1867.) Where a court has no jurisdiction of a case, it cannot award costs, or order execution for them to issue. *The Mayor v. Cooper*, 6 Wall. 247.

11. (Dec., 1869.) Where the Circuit Court dismisses a bill for want of jurisdiction apparent on its face, the general rule is not to allow costs. *Hornthall v. The Collector*, 9 Wall. 560.

12. (Oct., 1874.) Where confessedly the title of a party claiming land as owner, and who has agreed to sell, is denied by the vendee, and a dispute has taken place about title, so that a tender of a deed would be a useless ceremony, costs on a bill filed to enforce the payment of the purchase-money must abide the result of the suit. *Lewis v. Hawkins*, 23 Wall. 120.

13. (Oct., 1879.) Where such letters [patent] had been reissued in separate divisions, and the patentee filed in the Patent Office a disclaimer in regard to one of them, after bringing a suit for the infringement of the others, the validity of which was sustained, and the fact of infringement found by the court below, — *Held*, that sec. 4922, Rev. Stat., has no application to the case, and that he is entitled to costs. *Elastic Fabrics Co. v. Smith*, 10 Otto, 110.

14. (Oct., 1833.) In a case of tort, several costs of travel, attendance, and attorney's fees will be allowed to several defendants, whether the pleadings are joint or several. *Crosby v. Folger*, 1 Sumn. 514.

15. (May, 1842.) The Judiciary Act of 1789, ch. 20, s. 30,

does not peremptorily ordain that the testimony of witnesses living more than a hundred miles from the place of trial shall be taken by deposition ; but it only permits such a course ; and if such witnesses be present in court at the trial, and give their testimony orally, the full cost of their travel and attendance should be allowed in the costs. *Prouty v. Draper*, 2 Story, 199.

16. By the statute of 1 Will. IV. ch. 22, giving authority to English courts of law to issue commissions for the examination of witnesses abroad, the court may, in its discretion, allow the expenses of the witnesses, or the costs of the commission. *Ib.*

17. Postage paid on a commission should be allowed as a part of the costs thereof. *Ib.*

18. (May, 1844.) Where the plaintiff taxed his travel from Lowell, where he lived, to Portland, the place of the trial, at the several times when he actually attended, — *Held*, that such tax was proper, as his personal attendance was important. *Whipple v. Cumberland Cotton Co.*, 3 Story, 84.

19. Where the testimony of a witness residing in another state or country is important and necessary, his fees for actual travel and attendance from his place of residence are properly taxable in the case. *Ib.*

20. (April, 1858.) It would be a sound rule to adopt, to govern the practice where costs are to be paid, on the amendment of a declaration or other pleading, or on the making of an order of court, and no time is limited for their payment, that, unless the attorney, to whom the costs are to be paid, requests the attorney of the opposite party to pay them, or gives him some intimation to pay them, the payment, according to the strict terms of the order, is waived. *Ransom v. City of New York*, 4 Blatchf. 157.

21. In this case, an order having been made vacating a judgment, on payment by the defendant of the costs to that time, but no request having been made for such payment, and proceedings having afterwards taken place in the cause, which presupposed that the judgment was vacated, — *Held*, that the plaintiff had impliedly waived the condition as to the payment of costs, and that the judgment was no longer a valid judgment. *Ib.*

22. (May, 1869.) When a separate writ for attaching each member of the board [of supervisors for contempt of court], has been issued, the marshal and clerk will be allowed their costs in each case. *Durant v. Supervisors*, Woolw. 377.

23. The district attorney is entitled to but one fee for all the cases arising out of one writ of *mandamus*. *Ib.*

Dedimus.

1. (Feb., 1808.) *Semb.* That the certificate of commissioners named in a *dedimus*, that they took in due form of law the oath annexed to the commission, is sufficient evidence of that fact. *Grant v. Naylor*, 4 Cranch, 224.

2. If the return of the commissioners be inclosed in an envelope which is sealed by the commissioners, no other sealing by the commissioners is necessary. *Ib.*

3. (May, 1812.) Practice as to granting commissions to take evidence in foreign countries. *Cunningham v. Otis*, 1 Gall. 166.

4. (Oct., 1808.) The plaintiffs issued a commission to take testimony abroad, and the defendant joined in the same by filing cross-interrogatories; but the plaintiffs afterwards found a witness to prove the facts they desired to establish by the commission, and abandoned it. The court said, a trial under these circumstances would be a surprise to the defendant. *Le Roy v. The Delaware Ins. Co.*, 2 Wash. 223.

5. (Nov., 1875.) Sec. 866 of the Revised Statutes gives the courts of the United States power to grant a *dedimus potestatem* to take depositions according to common usage, whenever in their judgment it may be necessary to prevent a failure or delay of justice; and secs. 863, 864, and 865 of said Revised Statutes, relating to taking depositions *de bene esse* have no application to the granting or execution of a *dedimus*. *Jones v. Railway Co.*, 3 Sawyer, 523.

6. The mode of issuing and executing a *dedimus*, granted in pursuance of said sec. 866, is regulated by "common usage" or practice, which usage or practice, as to this court, is prescribed by secs. 807, 808, and 809 of the Oregon Civil Code relating to taking depositions on commission; and title 7 of chapter 9 of said code, relating to taking depositions *de bene esse*, does not apply. *Ib.*

7. A person appointed to execute a *dedimus* represents the court, and not the parties; and his commission should contain full directions as to the manner of its execution, as set forth in sec. 809 of the Oregon Civil Code. *Ib.*

8. In certifying the deposition to the court, it is not necessary

for the commissioner to state when or where the examination of the witness was taken, nor by whom it was reduced to writing, or that the witness was "cautioned" before being sworn. *Ib.*

9. A witness examined under a *dedimus* should be sworn according to the law of the forum whence it issued. *Ib.*

10. Sec. 860 of the Oregon Civil Code having provided that an affirmation may be made by any person in place of an oath, a *dedimus* which authorizes the commissioner to administer an oath to a witness, is well executed in this respect when it appears from the return thereto that the witness was duly affirmed. *Ib.*

11. A return to a *dedimus* need not show how a witness was sworn or affirmed, if it states substantially that the witness was duly sworn or affirmed; nor is it material whether the facts required to be stated in such return are stated in the introduction or conclusion of the examination, if they are plainly referred to and included by the commissioner in certifying the deposition as a part of the proceeding and return. *Ib.*

Demurrer to Evidence.

1. (Feb., 1826.) On a demurrer to evidence, the judgment of the court stands in the place of the verdict of the jury; and the defendant may take advantage of any defects in the declaration, by motion in arrest of judgment, or by writ of error. *Bank of United States v. Smith*, 11 Wheat. 171.

2. On a demurrer to evidence, the court is substituted in the place of the jury as judges of the facts, and everything which the jury might reasonably infer from the evidence is to be considered as admitted. *Ib.*

3. The practice of demurring to evidence is to be discouraged, and courts will be extremely liberal in their inferences where the party takes the question of fact from the appropriate tribunal. *Ib.*

4. (Feb., 1826.) No judgment can be rendered upon a demurrer to evidence until there is a joinder in demurrer; and issue cannot be joined upon the demurrer, so long as there is any matter of fact in controversy between the parties. *Fowle v. Alexandria*, 11 Wheat. 320.

5. The demurrer to evidence must state facts, and not merely the evidence conducing to prove them. *Ib.*

6. One party cannot insist upon the other party joining in demurrer, without distinctly admitting upon the record every fact and every conclusion which the evidence given for his adversary conduces to prove. *Ib.*

7. Where the demurrer to evidence is defective in these respects, and judgment has, notwithstanding, been rendered upon it for the party demurring, by the court below, the judgment will be reversed in this court, and a new trial awarded. *Ib.*

8. (Jan., 1830.) The defendant in the court below having withdrawn his cause from the jury by a demurrer to evidence, or having submitted to a verdict for the plaintiff, subject to the demurrer, cannot hope for a judgment in his favor, if by way of fair construction of the evidence the verdict can be sustained. *Chinoweth v. Haskell*, 3 Pet. 92.

9. (May, 1830.) Upon a demurrer to evidence, the party demurring is bound to admit all the facts which the evidence on the other side conduces to prove; and the court, on such a demurrer, will infer them in his favor. *Johnson v. United States*, 5 Mason, 425.

10. (Nov., 1821.) A demurrer to evidence supposes that evidence to be already admitted; and no objection can then be taken to it on the ground that it is inadmissible. Where incompetent testimony is admitted, the proper remedy is by a bill of exceptions. If the party declines taking this course, and demurs to the evidence, he waives all objection to its admissibility, and places his cause on its sufficiency to establish the fact in controversy. *Jacob v. United States*, 1 Brock. 520.

11. A party who demurs to evidence is bound to admit every conclusion that may fairly be deduced from it. *Ib.*

Depositions.

1. (Feb., 1806.) Notice of the time and place of taking a deposition, given to the attorney-at-law of the opposite party, is not such notice as is required by the Act of Assembly of Virginia. But the attorney-at-law may agree to receive or to waive notice, and shall not afterwards be permitted to allege the want of it. *Buddicum v. Kirk*, 3 Cranch, 293.

2. If notice be given that a deposition will be taken on the 8th of August, and that if not taken in one day the commissioners will adjourn from day to day until it shall be finished; and the

commissioners meet on the 8th, and adjourn from day to day till the 12th, and from the 12th to the 19th, when the deposition is taken, such deposition is not taken agreeably to the notice. *Ib.*

3. (Feb., 1819.) Depositions, taken according to the proviso in the thirtieth section of the Judiciary Act of 1789, ch. 20, under a *dedimus potestatem*, "according to common usage, when it may be necessary to prevent a failure or delay of justice," are under no circumstances to be considered as taken *de bene esse*, whether the witnesses reside beyond the process of the court or within it; the provisions of the act relative to depositions *de bene esse* being confined to those taken under the enacting part of the section. *Sergeant v. Biddle*, 4 Wheat. 508.

4. (Jan., 1847.) By the thirtieth section of the Judiciary Act of 1789 (1 Stat. at Large, 88), depositions may be taken in certain cases, and notice thereof must be served on the adverse party or his attorney, provided either of them is within one hundred miles of the place where such deposition is taken. *Dick v. Runnels*, 5 How. 7.

5. A certificate of the person before whom the deposition was taken, that neither the adverse party nor his attorney lived within one hundred miles of such place, and that therefore no notice was made out, is sufficient. It is not necessary for him to state that they were not actually within one hundred miles. If they had been temporarily within that distance, and the certifying officer did not know it, the certificate would still have been good. *Ib.*

6. If either of the two facts, viz., that the party resided within one hundred miles, or that he was temporarily within that distance, and that the magistrate knew it, were established by parol proof, the certificate would then be irregular and void. *Ib.*

7. (Jan., 1849.) The conditions under which a party is permitted, and a magistrate authorized, to take a deposition *de bene esse*, by the thirtieth section of the Judiciary Act, are:—

1st. That the witness lives at a greater distance from the place of trial than one hundred miles.

2d. Or is bound on a voyage to sea.

3d. Or is about to go out of the United States.

4th. Or out of such district, to a greater distance from the place of trial than one hundred miles, before the time of trial.

5th. Or is ancient or very infirm.

And to entitle himself to read the deposition upon the trial, the party must show : —

1st. That the witness is dead.

2d. Or gone out of the United States.

3d. Or to a greater distance than one hundred miles from the place where the court is sitting.

4th. Or that, by reason of age, sickness, or bodily infirmity, he is unable to travel and appear at court. *Harris v. Wall*, 7 How. 693.

8. The authority or jurisdiction conferred on the magistrate is special, and confined within certain limits or conditions ; and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof. *Ib.*

9. Therefore, where the magistrate, in his notice to the opposite party, only said that the witness was about to “depart the state,” and in his certificate omitted to state the reason for taking the deposition, it was not competent for the party, at the trial, to supply the defect by proving that the witness was about to go out of the United States. *Ib.*

10. The service of the notice upon the opposite party should be certified by the magistrate, as well as the marshal. *Ib.*

11. When counsel have signed an agreement that a deposition may be read in evidence to the jury, it is too late, after its reading, to ask the court to exclude from the consideration of the jury a part of the deposition. *Ib.*

12. (Dec., 1865.) Where a deposition is taken upon a commission, the general rule is that all objections to it of a formal character, and such as might have been obviated, if urged on the examination of the witness, must be raised at such examination, or upon motion to suppress the deposition. It is too late to raise such objections for the first time at the trial. *York Company v. Central Railroad*, 3 Wall. 107.

13. (Dec., 1865.) If neither the original nor such copy has been annexed [to the deposition], the objection to the want of such original or copy should be taken in some form (such as motion to suppress) before the trial. If made first on the trial, it is too late. *York Company v. Central Railroad* (*supra*, p. 107), on this point affirmed. *Blackburn v. Crawford*, 3 Wall. 175.

14. (Oct., 1844.) A deposition *in perpetuum*, which has not been recorded according to the law of the state where it is taken,

is not competent evidence in the courts of the United States. *Gould v. Gould*, 3 Story, 516.

15. (April, 1816.) It is the duty of a party who knows of the intended departure of a material witness to take the deposition of such witness; and if he should neglect to do so, he should issue a commission to take his testimony at the place where he may be, and have the commission executed without delay. *The King of Spain v. Oliver*, Pet. C. C. 217.

16. (Oct., 1851.) Although there is an act of Congress which allows subpoenas *ad testificandum* to run from the Circuit Courts into districts not their own, yet where the witness who has been thus subpoenaed shows no disposition to treat the process of the court with contempt, the issuing of an attachment is always matter of discretion with the court. And where it would be oppressive, or dangerous to the health of the witness, or where any strong reason of business or family exists against his compulsory absence from home, the court will not compel his attendance, but will either postpone the cause or have his deposition taken. *Ex parte Beebees*, 2 Wall. Jr. 127.

17. (Dec., 1830.) An agreement to admit certain depositions not regularly taken, and between other parties as evidence, extends to the final termination of the cause, though it should be taken to the Supreme Court and sent down for further proceedings. *Hinde v. Vattier*, 1 McLean, 110.

18. (May, 1855.) The law and practice of the state having been adopted in regard to the taking of depositions, a subsequent modification of the law, which was followed for a long time, will be considered as adopted by usage. *Curtis v. Central Railway*, 6 McLean, 401.

19. (June, 1869.) A deposition must be suppressed when it does not affirmatively appear that the witness resided more than one hundred miles from the place where the cause was to be tried. *Dunkle v. Worcester*, 5 Biss. 102.

20. It is not competent for the court to supply a jurisdictional word, though the omission may appear to be merely clerical. *Id.*

21. (June, 1869.) It is proper practice for the federal court, upon application before the trial, to allow depositions taken in a suit between the same parties for the same cause of action to be filed as evidence. *Grunninger v. Philpot*, 5 Biss. 104.

22. A party objecting should show affirmatively that there was

mistake, misapprehension, or other good cause why they should not be received. *Ib.*

23. In doubtful cases, it is better, ordinarily, to admit than to exclude evidence. *Ib.*

24. (1879.) In common-law actions in the federal courts, depositions may be taken pursuant to the state law or the act of Congress, as parties may elect. *Flint v. Board of Commissioners*, 5 Dill. 481.

25. (May, 1847.) The deposition of a witness residing more than one hundred miles from the place of trial may be taken *de bene esse*, in or out of the district, in suits at common law, under the Judiciary Act of 1789 (1 Stat. 88). *Russell v. Ashley*, Hempst. 546.

26. After it is taken, and before trial, if the witness moves within one hundred miles, still the deposition may be read, unless the party objecting shall show that fact, and that it was known to the opposite party in time to have had the witness subpœnaed (5 Pet. 613). *Ib.*

27. A witness residing more than one hundred miles from the place of trial is beyond the coercive power of a subpœna, whether he resides in or out of the district; and the party who issues a subpœna for him must pay the costs attending it, and cannot throw them on the opposite party. *Ib.*

28. The officer taking depositions should certify each item of costs, and transmit the evidence of services rendered, so that the court may see that the services have been performed, and that the charges are such as the law allows. *Ib.*

Costs retaxed on the principle above stated, and errors ascertained. *Ib.*

29. Mode of taking depositions under the thirtieth section of the act of 1789; subpœnaing witnesses and rules of court explained in note. *Ib.*

30. (May, 1848.) Where the name of a defendant is omitted in the caption of a deposition, but appears in the commission and proceedings, such deposition should not be excluded. *Merrill v. Dawson*, Hempst. 563.

31. Notice to take depositions is sufficient, if served by delivering a copy to the party, or leaving such copy at his dwelling-house or usual place of abode, with a free white person, a member of or resident in the family. *Ib.*

32. If a witness resides more than one hundred miles from the place of trial, his deposition may be taken under the thirtieth section of the Judiciary Act of 1789 (1 Stat. 88), without notice. But the requisites of that act must be observed strictly. *Ib.*

33. The residence of the witness and distance from the place of trial are facts proper for the inquiry of the officer taking the deposition; and his certificate of those facts is competent evidence and sufficient to authorize the deposition to be read. *Ib.*

34. The Probate Court of Mississippi, being a court of record, and possessing a seal, the judge thereof is the judge of a county court, within the meaning of the above act, and, as such, authorized to take a deposition under it. *Ib.*

35. Notice of the time and place of taking depositions is necessary under a joint commission; but when the opposite party, after notice, fails or refuses to join, and the commission issues *ex parte*, notice is not necessary. *Ib.*

36. On an *ex parte* commission, the party suing it out is at liberty to put as few of the interrogatories as he thinks proper, except that he must put the last general interrogatory. *Ib.*

37. (April, 1854.) A deposition taken under the thirtieth section of the Judiciary Act of 1789 must be reduced to writing by the magistrate or witness, and no other person is competent to perform that duty. *Marstin v. McRea*, Hempst. 688.

38. (April, 1854.) In taking depositions under the act of 1789 (1 Stat. 88), it must appear that the witness was sworn to testify the whole truth; also that the deposition was written by the magistrate, or by the deponent in his presence; otherwise it is not admissible. *Rainer v. Haynes*, Hempst. 689.

39. The magistrate cannot depute a person to write the deposition. *Ib.*

40. Form of certificate, and judicial decisions as to depositions, in note. *Ib.*

41. (April, 1855.) In a deposition taken under the act of Congress of 1789, if the names of any of the parties do not appear in the caption or some part of the deposition, it is a fatal objection to it. The names of all the parties must appear. *Waskern v. Diamond*, Hempst. 701.

42. Cases as to depositions cited in note. *Ib.*

Dismissing for Want of Jurisdiction.

1. (Oct., 1846.) If a want of jurisdiction over the case comes to the knowledge of the court in any way before trial, though not objected to by the proper person, the court will not proceed, being a court of limited powers. *Heriot v. Davis*, 2 Woodb. & M. 229.

2. (April, 1869.) Where a court of the United States has no jurisdiction of a case, it has no power to make any order in it except to dismiss it for want of jurisdiction. *Fisk v. Union Pacific Railroad Co.*, 6 Blatchf. 362.

3. (Oct., 1824.) Defendant may, at any time before trial, object to the jurisdiction, on motion, or by plea, or on the general issue, with notice to the adverse party. *Bobyshall v. Oppenheimer*, 4 Wash. 482.

4. (April, 1866.) In the courts of the United States, if at any stage of a suit it becomes apparent that the court has not jurisdiction, no further proceedings will be had, and the case will be dismissed on that ground as to those parties to whom the objection applies. *McCloskey v. Cobb*, 2 Bond, 16.

District Judges in Circuit Courts.

1. (Feb., 1795.) Though a district judge is on the bench, if he does not sit in the cause, he is absent in contemplation of law. *Bingham v. Cabbot*, 3 Dall. 19, 36.

2. (Feb., 1808.) The district judge may alone hold a Circuit Court, although there be no judge of the Supreme Court allotted to that circuit. *Pollard v. Dwight*, 4 Cranch, 421.

3. (1870.) The organization of the Circuit Court for the districts of Missouri is peculiar, and is provided for by the act of March 3, 1857 (11 Stat. 197).

By this act it was provided that Missouri should be divided into two districts, with but one Circuit Court for both, and that the two judges of the District Court should sit in the Circuit Court. *Held*, that the act of April 10, 1869 (16 Stat. 44), creating the office and providing for the appointment of circuit judges, and declaring who should hold the Circuit Courts, did not exclude either of the district judges from the right still to sit in the Circuit Court. *In re Circuit Court for the Districts of Missouri*, 1 Dill. 1.

Evidence.

1. (Feb., 1805.) If usury be specially pleaded, and the court reject the evidence offered upon such special plea, it may be admitted upon the general issue, notwithstanding it has been refused upon the special plea. *Levy v. Gadsby*, 3 Cranch, 180.

2. (Feb., 1806.) Upon a plea of payment, to debt on bond, it is competent for the defendant to give in evidence, that wheat was delivered to the plaintiff, on account of the bond, at a certain price; and that the defendant assigned sundry debts to the plaintiff, part of which were collected by the plaintiff, and part lost by his indulgence or negligence. *Buddicum v. Kirk*, 3 Cranch, 293.

3. (Feb., 1812.) In a suit against the maker of a promissory note, by an indorser who has been obliged to take it up, the plaintiff must produce the note upon the trial. *Morgan v. Reintzel*, 7 Cranch, 273.

4. (Feb., 1815.) If the plaintiff in his declaration claims the whole tract, a deed, showing that he has only an undivided interest in the tract, may be given in evidence. *Doe v. M'Farland*, 9 Cranch, 151.

5. (Feb., 1818.) Under the sixth section of the patent law of 1793, ch. 156, the defendant pleaded the general issue, and gave notice that he would prove at the trial that the machine, for the use of which without license the suit was brought, had been used previous to the alleged invention of the plaintiff in several places which were specified in the notice, or in some of them, "and also at sundry other places in Pennsylvania, Maryland, and elsewhere in the United States." The defendant, having given evidence as to some of the places specified, offered evidence as to others not specified. *Held*, that this evidence was admissible. But the powers of the court, in such a case, are sufficient to prevent, and will be exercised to prevent, the patentee from being injured by surprise. *Evans v. Eaton*, 3 Wheat. 454.

6. Testimony on the part of the plaintiff, that the persons of whose private use of the machine the defendant had given evidence had paid the plaintiff for licenses to use the machine since his patent, ought not to be absolutely rejected, though entitled to very little weight. *Id.*

7. (Jan., 1831.) However convenient a rule established by a Circuit Court relative to the introduction of secondary proof

might be to regulate the general practice of the court, it could not control the rights of parties in matters of evidence admissible by the general principles of law. *Doe v. Winn*, 5 Pet. 233.

8. (Jan., 1835.) The proofs must be according to the allegations of the parties; and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for decision; for the pleadings do not put them in contestation. *Harrison v. Nixon*, 9 Pet. 483.

9. (Jan., 1848.) Under a plea of *non assumpsit*, testimony cannot be received relating to the residence of a party and bearing upon the jurisdiction of the court. *Sims v. Hundley*, 6 How. 1.

10. (Jan., 1849.) It was error in the court below to reject the testimony of an attorney upon the ground of his being security for costs, when the party for whom he was security had already obtained a judgment against his adversary, and also upon the ground of his being interested when he held certain notes only for the purpose of paying the money over to his clients when recovered. *Patton v. Taylor*, 7 How. 132.

11. (Jan., 1850.) A release given by the purchaser to the auctioneer, for the purpose of making him a competent witness, did not operate as a bar to a recovery against the vendors. He would have been a competent witness without it. *Veazie v. Williams*, 8 How. 134.

12. (Dec., 1852.) The court having erroneously refused to allow the plaintiff to offer a paper in evidence, as a disclaimer of part of a patent, afterwards refused to allow the defendants to offer the same paper in evidence for the purpose of prejudicing the plaintiff's rights. This last refusal was correct. The reason given was erroneous; but this is not a sufficient cause for reversing the judgment. *Silsby v. Foote*, 14 How. 219.

13. (Dec., 1857.) In an action against the owners of a ferry-boat for personal injuries sustained by the negligence of its officers, it was held that the plaintiff might show that he was engaged in a particular business, and had been incapacitated from attending to it, as exhibiting the extent of the injury, and that it had occasioned expense, suffering, and loss of time which had value to him, although the nature of his occupation was not set forth in the declaration. *Wade v. Leroy*, 20 How. 34.

14. (Dec., 1858.) A suit could be maintained upon the cou-

pons without the production of the bonds to which they had been attached. *Knox County v. Aspinwall*, 21 How. 539.

15. (Dec., 1859.) Where the cause of action against the defendants was that they had fraudulently sold the goods of the plaintiff, evidence was admissible that they had committed similar fraudulent acts, at or about the same time, with a view to establish the intent of the defendants with respect to the matters charged in the declaration. *Castle v. Bullard*, 23 How. 172.

16. (Dec., 1865.) Under a statute of California, which provides that new matter in an answer shall, on the trial, be deemed controverted by the adverse party, witnesses may properly be examined, in a case where such an answer, having new matter, is put in. *Cheang-Kee v. United States*, 3 Wall. 320.

17. (Dec., 1872.) Evidence which, in connection with other evidence offered, tends to make out a defense, is properly receivable, though it may not itself prove all the facts necessary to constitute a defense. *Deutsch v. Wiggins*, 15 Wall. 540.

18. (Oct., 1876.) Where a question put to a witness is in itself unobjectionable, but the answer goes beyond what is called for, and is improper or incompetent testimony, an objection to the question will not extend to the answer. Special objection must be taken in such case to the answer. *So held*, where a witness was asked whether he could form a judgment of the quantity of timber which had been on certain pine-timber lands from the stumps that remained, and he stated in his answer what, in his judgment, the quantity was. *Gould v. Day*, 4 Otto, 405.

19. (June, 1849.) The citizenship alleged in the declaration need not be proved, unless specially denied by plea. *Evans v. Davenport*, 4 McLean, 574.

Evidence. Records.

1. (Dec., 1851.) Where the suit was upon a postmaster's bond, and the district attorney offered to read in evidence an authentic copy thereof, which the court refused to receive, this refusal was erroneous. *United States v. Wilkinson*, 12 How. 246.

2. Although the presumption of law is in favor of the correctness of the court below, where no reasons appear, yet in this case the record itself shows the error. If there was any fact which

made the copy of the bond inadmissible, it ought to have been shown by the defendants, and set forth in the exception. *Ib.*

3. (Dec., 1869.) The proper mode of proving papers on file in any of the departments or public offices of the government, is by procuring certified copies from those persons who have them in custody. The counsel for the government cannot be compelled to produce either such copies or the originals for the benefit of parties who may be litigating with the government. *Barney v. Schneider*, 9 Wall. 249.

4. Notice, therefore, to the party or counsel representing the government, to produce such papers, does not authorize the party giving the notice to use other copies than those properly certified as above stated. *Ib.*

5. (Dec., 1872.) In order to render a certified copy of a deed admissible in evidence in Texas, it must be filed with the papers in the cause at least three days before the commencement of the trial; but the affidavit of loss of the original deed need not be filed until the trial. *Hanrick v. Barton*, 16 Wall. 166.

6. (Oct., 1873.) The improper exclusion of a record is not error when the party offering it has proved, in another way, every fact which the record, if it had been admitted, would prove. *Lucas v. Brooks*, 18 Wall. 436.

Evidence. Burden of Proof.

1. (Jan., 1879.) When a defendant has shown prior knowledge and use, the burden of showing prior invention is on the plaintiff. *Webster Loom Co. v. Higgins*, 15 Blatchf. 446.

2. (Oct., 1879.) The burden of proof is on a defendant to establish, by satisfactory evidence, the prior use of a patented invention. *Parker v. Remhoff*, 17 Blatchf. 206.

Evidence. Production of Books and Papers.

1. (Jan., 1844.) A refusal to produce books and papers under a notice lays the foundation for the introduction of secondary evidence of their contents, but affords neither presumptive nor *prima facie* evidence of the fact sought to be proved by them. *Hanson v. Eustace*, 2 How. 653.

2. Nor are the jury at liberty, in such a case, to consider a

refusal to furnish books and papers as one of the reasons upon which to presume a deed ; and instruction from the court which permits them to do so is erroneous. *Ib.*

3. (Oct., 1853.) The fifteenth section of the act of Sept. 24, 1789 (1 Stat. at Large, 82), empowering the courts of the United States to compel the production of books and papers in trials at law, has so far altered the common law as to inflict upon the party the penalty of a nonsuit or default upon the non-production of a paper, instead of merely letting in the opposite party to parol proof. *Iasigi v. Brown*, 1 Curt. C. C. 401.

4. An order to produce may be applied for before trial, upon notice. *Ib.*

5. A *prima facie* case of the existence of the paper and its materiality must be made out ; and the court will then pass an order *nisi*, leaving the opposite party to produce, or show cause at the trial, where alone the materiality can be finally decided. *Ib.*

6. The fact that a bill of discovery has been filed and answered, but the papers not produced, is not a bar. *Ib.*

7. (April, 1847.) A plaintiff in a suit in equity is entitled, on motion for that purpose, to have produced for inspection, and to be used in aid of his suit, documents in possession of the defendant or his agents, which are referred to in the answer, without being set forth at large, and are material to the support of the plaintiff's rights. *Robbins v. Davis*, 1 Blatchf. 238.

8. But he is not entitled, by motion, to call for the production by the defendant of papers to which no allusion is made in the answer. *Ib.*

9. If his bill alleges the existence of such papers, and their possession by the defendant, and the answer fails to reply to the allegation, he should except to the answer. *Ib.*

10. Where the answer sets forth extracts from the defendant's books, which are sworn to embrace everything in the books that relates to the subject-matter of the suit, the plaintiff cannot, upon motion, and on a suggestion that the extracts given are, if not garbled, at least liable to suspicion, entitle himself to a general inspection of the books of the defendant relating to other matters. *Ib.*

11. He is entitled to the production, for inspection, of the books which contain the extracts given ; but the defendant is at liberty to seal up the other parts of the books ; and the inspection must take place under the supervision of an officer of the court. *Ib.*

12. But he is not entitled to the production of a book where his bill does not in any way call for its production or discovery, or show its materiality to the matters in controversy. *Ib.*

13. (May, 1846.) In a proceeding in this court, under sec. 15 of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 82), to obtain a discovery, in an action at law, of documents in the possession of the adverse party, it is only requisite that the cause should be at issue, and that the court should be satisfied that the evidence required to be disclosed will be pertinent to such issue, and that the circumstances should be those in which a discovery would be decreed in chancery. *Jacques v. Collins*, 2 Blatchf. 23.

14. It is not necessary that the petition for the discovery should contain the formalities of a bill of discovery in chancery ; but it is enough if it contains a notice to the opposite party of the time and place of making the application, and a plain designation of the documents sought for. *Ib.*

15. (Sept., 1851.) Under sec. 15 of the act of Sept. 24, 1789, (1 Stat. at Large, 82), the courts of the United States have power, on the application of a party to an action, to require the production of books or writings in the possession or power of the adverse party, which contain evidence pertinent to the issue, only in cases and under circumstances in which a court of chancery, by the ordinary rules of proceeding in that court, would compel the production of the same. *Finch v. Rikeman*, 2 Blatchf. 301.

16. The authority conferred by the act can be exercised, therefore, only in cases where the relief might have been had by a bill of discovery, and as a substitute for that proceeding. *Ib.*

17. Where, in an action at law for the infringement of a patent, the plaintiff applied to this court for an order requiring the defendant to produce his books, for the purpose of enabling the plaintiff to establish therefrom the quantity and value of certain machinery made by the defendant, which the declaration charged to have been made in violation of the patent, — *Held*, that the application could not be granted, because the direct consequence of the evidence, if obtained, would be to subject the defendant to a penalty, under sec. 14 of the act of July 4, 1836 (5 Stat. at Large, 123), and the plaintiff had not relinquished his claim to the penalty. *Ib.*

Indorsements. Striking out.

1. (Oct., 1848.) Where the indorsements on a bill of exchange, subsequent to that of the payee, were made for the purpose of transmitting and collecting the paper, they may be stricken out at the trial, in a suit by an indorsee. *Cassel v. Dows*, 1 Blatchf. 335.

Interest.

1. (Feb., 1824.) Where the defendant is restrained by an injunction from using money in his possession, interest will not be decreed against him. *Osborn v. Bank of United States*, 9 Wheat. 739.

2. (Oct., 1816.) Interest is allowable in such cases [where a consignee sells goods and neglects to remit], and also in actions for money had and received, from the time of a demand made, where the defendant has refused to account or to make payment, or has converted the money to his own use. *Pope v. Barrett*, 1 Mason, 117.

3. (March, 1876.) Interest from the commencement of the suit is recoverable as a matter of law, in an action upon a money demand, even though interest is not claimed in the petition. [Georgia.] *Whitaker v. Pope*, 2 Woods, 463.

Judgment.

1. (April, 1797.) The agreement is to enter judgment for what may be due. The plaintiff has no right to decide the question. It is evident from the terms of the agreement that there was something to settle; and the plaintiff, either by arbitration or by a jury, should have proceeded to make the settlement, with notice to the defendant, before he entered judgment, or at least before he issued the execution. *Hancock v. Hillegas*, 2 Dall. 380, 381.

2. (Feb., 1806.) A general dismissal of the plaintiff's *caveat*, in Kentucky, does not purport to be a judgment upon the merits. *Wilson v. Speed*, 3 Cranch, 282.

3. (Feb., 1809.) The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them. Judgments rendered in

such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities which may be totally disregarded. *Kempe v. Kennedy*, 5 Cranch, 185.

4. (Feb., 1823.) In debt, a less sum may be recovered than that demanded in the writ, where an entire sum is demanded, and it is shown by the counts to consist of several distinct accounts, or where the precise sum demanded is diminished by extrinsic circumstances. *Hughes v. Union Ins. Co.*, 8 Wheat. 295.

5. (Jan., 1831.) The defendants in the court below pleaded performance, and the plaintiffs alleged, as the breach, that at the time of the execution of the bond there were in the hands of Rector, as surveyor, to be applied and disbursed by him in the discharge of the duties of his office, for the use and benefit of the United States, divers sums of money, amounting, &c., and that the said Rector had not applied or disbursed the same, or any part thereof, for the use and benefit of the United States, as in the execution of the duties of his office he ought to have done. The jury found for the plaintiff, and assessed the damages for the breach of the condition at \$40,000, and the judgment was entered "*quod recuperet*," the *damages*, not the *debt*. This judgment is clearly erroneous. *Farrar v. United States*, 5 Pet. 373.

6. (Jan., 1839.) An action was instituted on a promissory note, against the drawer, by which the drawer promised to pay, at the office of discount and deposit of the Bank of the United States at Nashville, three years after date, \$4,080. In the declaration, which set out the note according to its terms, and alleged the promise to pay according to the tenor of the note, there was no averment that the note was presented at the bank, or demand of payment made there. The defendant pleaded payment and satisfaction of the note, and issue was joined thereon. Afterwards, at the succeeding term, the defendant interposed a plea *puis darrein continuance*, stating that \$4,204, part of the amount of the note, had been attached by B. and W., in a state court of Alabama, under the attachment law of the state, and a judgment had been obtained against him for \$4,204 and costs, with a stay of proceedings until the further proceedings in the case, which remains undetermined. The plaintiff demurred to this plea, and the Circuit Court sustained the demurrer; and judgment was given for the plaintiff for \$679, the residue of the note beyond the amount attached, and a final judgment for the

whole amount of the note. *Held*, that there was no error in the judgment of the Circuit Court. *Wallace v. M'Connell*, 13 Pet. 136.

7. (Jan., 1848.) Where, after verdict, a motion was made for a new trial, which was held under a continuance, and an entry was afterwards made that the motion was overruled, and judgment entered on the verdict, but at the time of such entry and judgment the court was not legally in session, it was no error in the court, at a subsequent and regular term, to treat the entry thus irregularly made as a nullity, to decide the motion, and enter up judgment according to the verdict. *Sheppard v. Wilson*, 6 How. 260.

8. The difference between this case and that of the *Bank of the United States v. Moss* (6 How. 31) pointed out. *Ib.*

9. (Jan., 1850.) If the jurisdiction of the Circuit Court be not shown in the proceedings in the case, its judgment is erroneous, and liable to be reversed; but it is not an absolute nullity. *Kennedy v. Georgia State Bank*, 8 How. 586.

10. (Dec., 1850.) According to the practice in Pennsylvania, where a defendant pleads set-off, the jury are allowed to find in their verdict the amount that the plaintiff is indebted to the defendant; and, according to their mode of keeping records, this result is entered by way of note; *e. g.*, "new trial refused, and judgment on the verdict."

Although this may be a good record in the courts of Pennsylvania, it does not follow that it is so in the courts of the United States. *Reeside v. Walker*, 11 How. 272.

11. The effect of such a judgment, that the plaintiff is indebted to the defendant, is merely to lay the foundation for a *scire facias* to try this new cause of action. *Ib.*

12. To sanction a judgment under a plea of set-off would virtually be allowing the United States to be sued, which the laws do not allow. *Ib.*

13. (Dec., 1851.) Where a declaration contained two counts, one of which set out an injunction bond with the condition thereto annexed, and averred a breach, and the second count was merely for the debt in the penalty, and the pleas were all applicable to the first count, which was upon trial stricken out by the plaintiff, and the court gave judgment upon the second count for want of plea, this judgment was proper, and must be affirmed. *Hogan v. Ross*, 13 How. 173.

14. (Dec., 1851.) Where a *scire facias* was issued against special bail, who pleaded two pleas, to the first of which the plaintiff took issue, and demurred to the second, and the cause went to trial upon that state of the pleadings, without a joinder in demurrer, and the court gave a general judgment for the plaintiff, this was not error. *Morsell v. Hall*, 13 How. 212.

15. (Dec., 1863.) On demurrer to any of the pleadings which are in bar of the action, the judgment for either party is the same as it would have been on an issue in fact joined upon the same pleading, and found in favor of the same party; and judgment of *nil capiat* should be entered, notwithstanding there may be also one or more issues of fact; because, upon the whole, it appears that the plaintiff had no cause of action. This rule of pleading declared and applied. *Clearwater v. Meredith*, 1 Wall. 26.

16. (Dec., 1865.) In debt for custom-house duties, a judgment for so many dollars, "payable in gold (and silver) money of the United States" for duties, is good [nothing but gold and silver coin having been made a legal tender for this species of debt to the government, though Treasury notes were, by a statute of 1862, made a legal tender in regard to most other debts]. *Cheang-Kee v. United States*, 3 Wall. 321.

17. If the judgment have been originally entered "payable in gold coin of the United States," &c., it may be amended during the term by the insertion of the words "and silver," as above indicated. *Ib.*

18. (Dec., 1868.) The rule that judgment will be given against the party who commits the first fault in pleading does not apply to faults of mere form. *Aurora City v. West*, 7 Wall. 82.

19. (Dec., 1868.) When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed in coin, and judgment rendered accordingly. *Butler v. Horwitz*, 7 Wall. 258.

20. (Dec., 1868.) Where, in an action (under the laws of Iowa) to recover land, the plaintiff averring that he claims and is entitled to the land, the defendant denying such right of possession, but setting up no title in himself, there has been a reversal in this court, and a mandate "to enter judgment for the defendant below," an entry by the court below that the defendant "hath right to the lands claimed in the declaration" is erroneous. The judgment should have been that the plaintiff hath

no title. Reversal and mandate accordingly. *Litchfield v. Railroad Co.*, 7 Wall. 270.

21. (Dec., 1868.) A patentee claiming under a reissued patent cannot recover damages for infringements committed antecedently to the date of his reissue. *Agawam Company v. Jordan*, 7 Wall. 584.

22. (Dec., 1869.) It is competent for a court, for good cause, to set aside, at the same term at which it was rendered, a judgment of conviction on confession, though the defendant had entered upon the imprisonment ordered by the sentence. *Basset v. United States*, 9 Wall. 38.

23. (Dec., 1870.) The seizure of the property of the defendant [in attachment] under the proper process of the court is therefore the foundation of the court's jurisdiction; and defective or irregular affidavits and publications of notice, though they might reverse a judgment in such case for error in departing from the directions of the statute, do not render such a judgment or the subsequent proceedings void. *Cooper v. Reynolds*, 10 Wall. 309.

24. (Dec., 1870.) A policy for \$10,000 was signed by four companies, each of whom agreed to become liable for one-fourth of the loss to that extent. *Held*, —

(1.) That one action could be brought against them all by their consent, the declaration charging the separate promises and praying for separate judgment.

(2.) That a verdict finding that the defendants did assume in manner and form as in the declaration alleged, and assessing the whole damages at \$10,000, was a good verdict in such action.

(3.) That the judgment rendered in such verdict should have been against each defendant for one-fourth of the damages, and against them jointly for the costs; and that a joint judgment against them all on the whole sum was erroneous, and should be reversed. *Insurance Co. v. Boykin*, 12 Wall. 433.

25. (Dec., 1871.) When a contract for money is by its terms made payable in specie or in coin, judgment may be entered thereon for coined dollars. *Bronson v. Rhodes* (7 Wall. 229) affirmed. *Thebilcock v. Wilson*, 12 Wall. 687.

26. (Dec., 1871.) Judgment in ejectment in favor of a single plaintiff sustained, where some counts in the declaration alleged a possession in himself alone at the time of the ouster, though other

counts alleged the possession to have been in him jointly with others, there having been no motion in arrest of judgment or other objection made below to the judgment in the form mentioned, which was one upon a verdict thus finding. *Armstrong v. Morrill*, 14 Wall. 120.

27. (Dec., 1871.) Where a demurrer to a special plea, which is a complete avoidance of the whole cause of action, is overruled, and the plaintiff does not reply, but suffers judgment to be entered against him on the plea, the court may properly enter judgment on the whole case, though another plea (a general issue) had been (against the rules of good pleading) filed, on which issue was taken; provided the issue thus raised on the last plea has, by the judgment on the demurrer, been in fact disposed of, and so rendered immaterial. *United States v. Ballard*, 14 Wall. 457.

28. (Oct., 1874.) To make a record of a judgment valid upon its face, it is only necessary for it to appear that the court had jurisdiction of the subject-matter of the action and of the parties, and that a judgment had in fact been rendered. *Maxwell v. Stewart*, 22 Wall. 77.

29. A trial by the court, without the waiver of a jury, is at most only error. 'A judgment after such a trial is not necessarily void. Mere errors cannot be set up as a defense to an action brought upon it. *Ib.*

30. (Oct., 1875.) The entry of a judgment, "that the suit is not prosecuted, and be dismissed," is nothing more than the record of a nonsuit. *Haldeman v. United States*, 1 Otto, 584.

31. The words "dismissed agreed," entered as the judgment of a court, do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. *Ib.*

32. (Oct., 1876.) In an action against an executor upon a contract of his testator, where a *devastavit* is not alleged and proved, a judgment *de bonis propriis* is erroneous. *Smith v. Chapman*, 3 Otto, 41.

33. (Oct., 1876.) When a judgment in one action is offered in evidence in a subsequent action between the same parties upon a different demand, it operates as an estoppel only upon the matter actually at issue and determined in the original action;

and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence. *Davis v. Brown*, 4 Otto, 423.

34. (Oct., 1876.) . . . *Held*, 1. That the [Circuit] Court had the right to set aside the judgment of March 2, during the term at which it was rendered, and to re-enter it as of the date when the motion to set it aside was made. *Memphis v. Brown*, 4 Otto, 716.

35. (Oct., 1829.) Where a contract is made between citizens of the same state, and the defendant is afterwards discharged, under the insolvent act of such state, from imprisonment, and his person is exempted from future imprisonment thereon, still, if the contract itself is not discharged, a general judgment will be entered against him, upon a suit brought in another state, according to the *lex fori*. *Titus v. Hobart*, 5 Mason, 378.

36. (Oct., 1845.) The terms of a final judgment cannot be altered by the court in any material part, except on a review, or appeal, or writ of error, or rehearing allowed for sufficient cause. *Jenkins v. Eldredge*, 1 Woodb. & M. 61.

37. (June, 1869.) In this case the court, on the motion of the plaintiff, made in 1867, opened a judgment recovered in 1862, and then paid and satisfied of record, in order to permit errors in the assessment of damages in the case to be corrected, the suit being one against a collector of customs, to recover back moneys paid under protest for duties, and the plaintiff, not having been guilty of laches, and the errors being manifest. *Crookes v. Maxwell*, 6 Blatchf. 468.

38. (Oct., 1871.) In an action at law for the infringement of letters-patent, the jury found a verdict for the plaintiff for \$700 damages. On a motion by the defendant for a new trial, the court was of opinion that the evidence, tending to prove actual damages sustained by the plaintiff, did not warrant a verdict for a greater amount than \$562.50. *Held*, —

(1.) The plaintiff might be allowed to remit the excess, instead of being required to submit to a new trial.

(2.) It appearing that the infringement was deliberate and intentional, and the plaintiff asking, under the statute, for an increase of the actual damages found, the court awarded judgment for \$1,200 and costs.

(3.) The defendant was allowed to require the plaintiff to first remit the amount of the excess of the verdict, or submit to a new

trial, the order of the court thereupon to award the plaintiff judgment as aforesaid. *Russell v. Place*, 9 Blatchf. 173.

39. (July, 1878.) A judgment will not be reversed for a refusal to admit evidence offered, unless it appears affirmatively that, if admitted, it would tend to prove a material fact in the cause. *Watt v. United States*, 15 Blatchf. 29.

40. (Aug., 1879.) Under the system of pleading adopted in New York, judgment at the trial in a suit at law is to be rendered in accordance with the facts pleaded and proved, without regard to the form of the pleadings or the theory on which they were prepared. *Whalen v. Sheridan*, 17 Blatchf. 9.

41. (Feb., 1880.) A judgment entered in 1872 on an assessment of damages, on default, was opened in 1880, to allow evidence to be given of payments made by one of the defendants, or out of his property, which should have been allowed and deducted from the assessment when the judgment was entered. *United States v. Millinger*, 17 Blatchf. 451.

42. (April, 1817.) While the ejectment was pending, the premises were sold under a mortgage, and purchased by Morris, to whom the defendant, for a valuable consideration, delivered possession of the same; and afterwards, in fraud of his agreement with Morris, he went to the office of the clerk of the court and confessed a judgment in favor of the plaintiff in the ejectment, upon which a *habere facias possessionem* issued, and the land was delivered to the plaintiff. On motion, the judgment and execution were set aside, and the cause reinstated; and the court, in order to maintain its jurisdiction, which, had Morris, a citizen of Pennsylvania, the purchaser under the mortgage, been made defendant, would have been lost, ordered that the original defendant should stand nominally as the defendant, and that Morris should give him security to pay the costs. *Lessee of Thomas v. Newton*, Pet. C. C. 444.

43. (Oct., 1808.) A judgment entered on a bond with warrant of attorney was set aside, the defendant having, some months before the time of executing it, resided in this state [Pennsylvania], and describing himself in the bond as late a resident of the State of Delaware. *Byrne v. Holt*, 2 Wash. 282.

44. (April, 1821.) In this case the judgment *quod computet* is interlocutory, from which no writ of error will lie; and the case is, therefore, fully under the control of the court. *Kitchen v. Williamson*, 4 Wash. 84.

45. (Oct., 1821.) When the summons is served ten days before the return-day, the plaintiff, on filing his declaration, is entitled to enter up judgment by *nil dicit*, for want of appearance. But this must be done at rules. *Hines v. Dean*, 4 Wash. 159.

46. (April, 1822.) Judgment by default and *habere facias possessionem* executed set aside; the service not being made on the tenant in possession, but on the landlord. *Den v. Talman*, 4 Wash. 200.

47. (Nov., 1856.) A judgment in ejectment by default for want of plea, without a rule to plead and thus putting the defendant in default, is irregular; and this whether the suit be brought in the way usual in the state courts of Pennsylvania, and now allowed by rule of court, in the federal court of the third circuit, or whether it be brought in the English way formerly used and still allowable in this court. *Paterson v. Evans*, 3 Wall. Jr. 215.

48. (March, 1873.) A default was set aside and judgment opened, where defendant, by affidavit, excused his neglect in not making defense, and made it appear that he had a good defense, and offered to pay costs and plead *instanter*; the motion to set aside the default having been made at the term at which the judgment was rendered, and continued several terms without fault of defendant. *Hand v. Mining Co.*, 2 Woods, 407.

49. (Oct., 1840.) The act of 3d March, 1797, which provides that judgment shall be given at the return term, against debtors of the United States, on motion, is limited to cases in which the principal debtor is a party to the action. *United States v. Lyon*, 2 McLean, 249.

50. (Oct., 1844.) A judgment of a previous term cannot be set aside on motion. *Brush & Durham v. Robbins*, 3 McLean, 486.

51. (Nov., 1872.) In Wisconsin, to open a judgment by default, a copy of the proposed answer, an affidavit excusing the default, and an affidavit of merits, must in all cases be recorded. *Republic Ins. Co. v. Williams*, 3 Biss. 370.

52. (April, 1869.) This court will not allow parties to be injured or prejudiced by any misunderstanding between their counsel.

[Motion to set aside a judgment entered on default, it being alleged that the default was taken and entered in violation

of an understanding between counsel.] *Campbell v. Barclay*, 4 Biss. 517.

53. (April, 1856.) Judgment in vacation cannot be entered unless in pursuance of a positive statute, whose provisions must be fully complied with. *Bonnell v. Weaver*, 5 Biss. 22.

54. In Wisconsin, the authority to confess the judgment must be in the statutory form, and be produced before the officer entering the judgment. *Ib.*

55. Equivalent provisions cannot be substituted by the court for the positive statutory provisions. *Ib.*

56. It is competent for the defendant to move to vacate the judgment, and also for the court thereupon, the proper papers being before it, to render a new judgment and issue execution. *Ib.*

57. (Nov. 1876.) Where a judgment is broader in its scope and more advantageous to a party than he is entitled to have, it will be reversed or modified, although upon the record it appears to be technically correct. *The 420 Mining Co. v. The Bullion Mining Co.*, 3 Sawyer, 634.

Judicial Notice.

1. (Dec., 1870.) The courts of the United States will take judicial notice of the public laws of the several states, and, in Indiana, of the private as well as public laws of that state. *Rail-road Company v. Bank*, 12 Wall. 227.

2. (Oct., 1875.) The court can take judicial notice of a thing in the common knowledge and use of the people throughout the country. *Brown v. Piper*, 1 Otto, 37.

Mandate.

1. (Jan., 1845.) Where this court has affirmed the title to lands in Florida, and referred in its decree to a particular survey, it would not be proper for the court below to open the case for a rehearing, for the purpose of adopting another survey. *Chaires v. United States*, 3 How. 611.

2. The court below can only execute the mandate of this court. It has no authority to disturb the decree, and can only settle what remains to be done. *Ib.*

3. (Jan., 1850.) This court having sent a mandate to a Cir-

cuit Court, to put a party into possession of certain lands, which were the subject of an ejectment suit, it was right in the Circuit Court not to extend the possession further than the land originally recovered in ejectment, although other lands were afterwards drawn into the controversy. *Walden v. Bodley*, 9 How. 34.

4. This court having issued an order, after the expiration of the demise, that the Circuit Court should place the plaintiff in possession, such an order proceeded on principles governing a court of equity, and the Circuit Court was bound to conform to it. *Ib.*

5. (Dec., 1864.) Though a court below is bound to follow the instructions given to it by a mandate from this, yet where a mandate has plainly been framed, as regards a minor point, on a supposition which is proved by the subsequent course of things to be without base, the mandate must not be so followed as to work manifest injustice. On the contrary, it must be construed otherwise, and reasonably. *Milwaukee & Minnesota Railroad Co. v. Soutter*, 2 Wall. 510.

Marshal.

1. (April, 1795.) An attachment is the process of the court, regularly issuing for the administration of justice, and therefore must be served by the marshal. *United States v. Montgomery*, 2 Dall. 335.

2. (Feb., 1813.) In the district of Connecticut the marshal may, upon an attachment for debt, without a *mittimus*, commit the defendant to prison for want of bail. *Palmer v. Allen*, 7 Cranch, 550.

3. (Jan., 1844.) A marshal has no right to receive bank-notes in discharge of an execution, unless authorized to do so by the plaintiff. *Griffin v. Thompson*, 2 How. 244.

4. If the marshal does receive such papers, the court, in the exercise of its power to correct the irregularities of its officer, will refuse a motion of the defendant to have satisfaction entered on the judgment, and refuse also to quash a second *feri facias*. *Ib.*

5. (Jan., 1844.) If the marshal receives bank-notes in discharge of an execution, and the plaintiff sanctions it, either expressly or impliedly, he is bound by it, and a motion to

quash the return ought to be refused. *Buckhannan v. Tinnin*, 2 How. 258.

6. (Jan., 1845.) A marshal is not authorized by law to receive anything, in discharge of an execution, but gold and silver, unless the plaintiff authorizes him to receive something else. *McFarland v. Gwin*, 3 How. 717.

7. The case of *Griffin et al. v. Thompson* (2 How. 244) reviewed and confirmed. *Ib.*

8. A marshal, like a sheriff, is bound, after the expiration of his term of office, to complete an execution which has come to his hands during his term; and an execution is never completed until the money is made and paid over to the plaintiff, if it is practicable to make it. *Ib.*

9. (Jan., 1846.) A plaintiff has a right to direct a deputy marshal to receive a certain description of money in satisfaction of an execution. *Gwinn v. Buchanan*, 4 How. 1.

10. But the deputy marshal then acts as agent of the plaintiff, and not as agent of the marshal. *Ib.*

11. (1873.) Since the act of June 1, 1872 (17 Stat. 196), as well as before, original process directed to the marshal must be served by that officer or his deputy, and cannot be served by a private person, although such mode of service, as respects process in the state courts, may be authorized. *Schwabacker v. Reilly*, 2 Dill. 127.

12. Subpœnas and notices directed to a witness or party need not necessarily be served by the marshal. *Ib.*

Motions.

1. (Dec., 1852.) Moreover, when the proceedings were quashed, they were still *in fieri*, and not terminated; and any irregularity could be corrected on motion. *Harris v. Hardeman*, 14 How. 334.

2. (Dec., 1865.) A motion to dismiss a case, from want of proper citizenship in the parties, cannot be made at the trial, and after pleading a general issue and special defenses. *De Sobry v. Nicholson*, 3 Wall. 420.

3. (Oct., 1868.) Judges of the Circuit Courts cannot direct a peremptory nonsuit; but the defendant, when the plaintiff's case is closed, may move the court to instruct the jury that the evi-

dence introduced by the plaintiff is not sufficient to warrant a verdict, and that, as matter of law, their verdict should be for the defendant. *Merchants' National Bank v. State National Bank*, 3 Cliff. 205.

4. The motion must be made at the close of the plaintiff's case, or the trial must proceed. *Ib.*

5. The motion is not addressed to the discretion ; it presents a question of law ; and the ruling of the court is a subject of exception. *Ib.*

6. (July, 1852.) The sufficiency, in point of substance, of a plea which is regular in form cannot be inquired into on motion. *Tyler v. Hyde*, 2 Blatchf. 399.

7. (June, 1867.) In making up a case on which to move for a new trial, oral testimony taken at the trial, by way of question and answer, must be reduced to the form of a narrative, or the court will refuse to hear the motion. *United States v. 508 Barrels, &c.*, 5 Blatchf. 407.

8. (Dec., 1874.) An action having been brought on a forfeited recognizance, and a motion being made, under sec. 1020 of the Revised Statutes, to remit the forfeiture, on the ground that the party bound to appear was, when called, in the custody of a state officer, under a warrant issued out of a court of the state, in a civil action, — *Held*, that the motion must be denied, on the ground that the question could be best determined on the trial of the action. *United States v. Stricker*, 12 Blatchf. 389.

9. (March, 1878.) All motions in a suit at common law which are required by the practice of the state courts of New York to be made at a special term of a state court may be made at a stated term of a federal court. *Emma Silver Mining Co. v. Park*, 14 Blatchf. 412.

10. (May, 1879.) After this cause had been set down for trial at the present term, the defendant moved for an order to compel the plaintiff's attorney to furnish a sworn statement of the residence, occupation, and present address of the plaintiff. *Held*, that the motion must be denied, without prejudice to other proceedings to secure the presence of the plaintiff at the trial. *Corbett v. Gibson*, 16 Blatchf. 336.

11. (May, 1801.) Upon a motion to discharge upon common bail, the court will not decide whether or not a discharge under the bankrupt law of Maryland will extinguish a debt contracted

in Philadelphia; nor whether a future or contingent debt may be proved under an insolvency in Pennsylvania, but will leave the defendant to plead the matter specially. *Knox v. Greenleaf*, Wall. C. C. 108.¹

12. (Oct., 1811.) Motion to take out of court money levied by the marshal, to satisfy a judgment obtained by the plaintiff against the defendant, on the ground of priority, under a judgment obtained in the court of the State of Pennsylvania in favor of William Lewis, Esq., who made the motion. *Azcarati v. Fitzsimmons*, 3 Wash. 134.

13. Although the remedy by motion to take money out of court in a case of this kind is not the only one the party has, yet, as it decides the rights of the parties in a summary way, it is convenient to all. But the court will take care that the party who shall be authorized to take the money is entitled to it under a regular execution, and under which the proceedings have been regular. If irregularities appear, sufficient to set aside the execution, the party must resort to his suit at law against the officer. *Ib.*

14. (Oct., 1823.) A motion to set aside a judgment by default, made after the term is over, by petition to a judge, is not within the words or the equity of the eighteenth section of the Judiciary Act of 1789. *Den v. M'Allister*, 4 Wash. 393.

15. A judgment by default against the casual ejector, for want of an appearance and confessing lease, entry, and ouster, may be set aside at a subsequent session, upon good cause shown, where the defendant swears to merits, and a trial has not been lost. The affidavit of the party is sufficient on which to found the motion. *Ib.*

16. (April, 1826.) After notice of trial, the defendant cannot move to put off the trial until the costs of a former ejectment be paid, without notice that such a motion would be made; nor can it prevail under any circumstances if the costs be demanded on an ejectment which had been decided in the state court. *Den v. Bacon*, 4 Wash. 578.

17. (April, 1870.) The judgment or order of a court finally disposing of a case cannot be reviewed at a subsequent term on motion. The only relief for errors in law in such cases is by review, writ of error, or appeal, as either may be appropriate. *The Bank v. Labitut*, 1 Woods, 11.

¹ Second edition.

18. (June, 1843.) A motion to produce a paper in the possession of the plaintiff, which is necessary to enable the defendants to plead, may be granted in the discretion of the court, although no notice has been given. *Bronson v. Kensey*, 3 McLean, 180.

19. But where the possession of a paper is desired to be used in evidence, a notice is necessary. *Ib.*

20. (1871.) One of the judges of the Circuit Court will not, against the objection of the adverse party, hear in vacation a motion to discharge property attached pursuant to the local laws of the state [Kansas], although the motion is one which may be properly made and heard by the court in term. *Claffin v. Steinberg*, 2 Dill. 324.

21. The provision of the state Attachment Act, that such a motion may be made in vacation before and decided by the state judge in whose court the action is pending, has, although the Attachment Act be adopted by rule in the federal court, no application to the judges of the latter tribunal. *Ib.*

22. (1873.) Objection to the jurisdiction may be taken by motion, and is not waived by subsequently pleading to the merits. *Nazro v. Cragin*, 3 Dill. 474.

23. Under the statute law of the State of Iowa, and the practice of the state courts therein, motions are parts of the record, and rulings thereon may be reviewed on error. Sec. 5 of the act of June 1, 1872, makes this practice applicable in the federal court on writ of error to the District Court, whose ruling on a motion to the jurisdiction may be reviewed. *Ib.*

24. (Sept., 1874.) Where one judge has denied a motion, another judge of the same court has jurisdiction to grant leave to renew the motion. *Robinson v. Satterlee*, 3 Sawyer, 134.

25. A judge of a United States District Court, while sitting alone as circuit judge, in the United States Circuit Court, has the same powers and jurisdiction as any other judge sitting in the same court. *Ib.*

New Trial.

1. (Feb., 1810.) When the reversal is in favor of the defendant, upon a bill of exceptions, a new trial must be awarded by the court below. *Hudson v. Guestier*, 6 Cranch, 281.

2. (May, 1812.) On a reversal of judgment in an action brought by writ of error from the District Court of Maine, the

Circuit Court may, if justice require, award a *venire facias de novo*, triable at the bar of the Circuit Court. *United States v. Sawyer*, 1 Gall. 86.

3. (May, 1819.) Where a special verdict is imperfect by reason of ambiguity or uncertainty, so that the court cannot say for which party judgment ought to be given, a *venire de novo* ought to be awarded. *Aliter*, where the plaintiff has only stated a defective title or case. *Bellows v. Hallowell & Augusta Bank*, 2 Mason, 31.

4. (June, 1830.) A new trial will not be granted on account of excessive damages, unless the jury have mistaken the principles of law which ought to regulate damages, or have been guilty of some gross error, which shows an improper feeling or bias on their part. *Thurston v. Martin*, 5 Mason, 497.

5. (Oct., 1833.) In what cases the court will interfere with a verdict upon matters of fact, and especially where fraud in fact is in issue, by granting a new trial. *Alsop v. Commercial Ins. Co.*, 1 Sumn. 451.

6. A new trial will not be allowed merely to let in new cumulative evidence to points made at the trial. *Ib.*

7. (Oct., 1833.) A new trial is not granted upon mere cumulative evidence. *Ames v. Howard*, 1 Sumn. 482.

8. (Oct., 1846.) Where a party in an action to recover a note had never enjoyed one trial in this court, but was defaulted, supposing the case was agreed to be continued, he is entitled to a trial, on petition within three years, under a statute of the State of Maine, and on proof of a probably good defense. *Clark v. Sohier*, 1 Woodb. & M. 368.

9. A new trial in such case is usually had by a writ of review sued out and served, rather than by bringing forward the old action, and serving a notice on the opposite side to defend. *Ib.*

10. (Sept., 1871.) Where a motion for new trial is founded on facts not within the knowledge of the presiding justice, and not appearing on his minutes, it must be verified by affidavit, unless compliance with that requirement is waived by the opposite party. *Vose v. Mayo*, 3 Cliff. 484.

11. No affidavit of merits is required where the motion is properly addressed to the minutes of the presiding justice, as where the motion is to set aside a verdict for error of ruling, in the admission or rejection of evidence, or for refusing to instruct

the jury as requested, or for misdirection, or because the verdict was against law, or against the evidence or the weight of the evidence. *Ib.*

12. Where the motion is founded upon alleged newly discovered evidence, or on the charge of misconduct by the opposite party or the jury, in respect to the trial, it presents a preliminary question whether the facts are such as to make it the duty of the court to order notice to the opposite party, and to direct how the proofs shall be taken. *Ib.*

13. In all such cases the motion must be in writing, and must, unless the requirement is waived, be supported by affidavit. *Ib.*

14. Affidavits of the witnesses to be examined cannot be considered a compliance with the twenty-second rule of the Circuit Court, relating to motions for new trials based upon newly discovered evidence. *Ib.*

15. The purpose of the rule is that the allegation of newly discovered evidence may be verified by the oath of the party or his attorney. *Ib.*

16. Probable cause for the motion must be shown, unless waived, before the court can interfere and give notice to the other side, or take steps to prevent the prevailing party from applying for judgment on the verdict. *Ib.*

17. Where the motion is properly verified by the affidavit of the party, *ex parte* affidavits of the witnesses are enough to warrant an application for notice to the opposite party. *Ib.*

18. Such affidavits are not, without consent, admissible on the final hearing of the motion. *Ib.*

19. For that purpose testimony must be taken in open court, in civil or criminal cases, by depositions, as provided by the acts of Congress, or by interrogatories and cross-interrogatories; or, by consent, the court will, in its discretion, appoint a commissioner to take the testimony and report it to the court. *Ib.*

20. In this case both parties had acquiesced in the taking of affidavits of the witnesses to be examined; and the court therefore looked into the affidavits as if they had been admitted by consent. *Ib.*

21. (Jan., 1861.) The practice in this court, on a decision being made by the court, is to enter a formal order upon it, and not to regard the decision itself as an order. *Boker v. Bronson*, 5 Blatchf. 5.

22. Where, on a motion for a new trial, a written decision was made by the judge holding the court, and filed, granting a new trial on condition of the payment of costs "within twenty days after service of this order," and no other or more formal order was made, and the costs were not paid, — *Held*, that the party making the motion was not in default in not paying the costs. *Ib.*

23. (Sept., 1870.) Where evidence admitted on a trial at law was objected to only as a whole, the admission of it will not, on a motion for a new trial, be regarded as erroneous, if the testimony, as a whole, was admissible for the purposes for which it was offered, although part of it, if specifically objected to, ought to have been excluded as incompetent. *Flint v. Norwich & New York Transportation Co.*, 7 Blatchf. 536.

24. (Feb., 1875.) In an action at law for the infringement of the patent, certain alleged prior inventions were put in evidence by the defendant, to affect the novelty of the invention patented. The jury were instructed in reference thereto in accordance with the foregoing construction of the patent [see the former note of the syllabus], and found a verdict for the plaintiff. On a motion for a new trial, on the ground that the verdict was against the weight of the evidence, — *Held*, that, although the court might have arrived at a different conclusion, the verdict would not be set aside unless the court could see that the jury was palpably mistaken, and that the weight of the evidence was decidedly against their verdict. *Roberts v. Schuyler*, 12 Blatchf. 444.

25. (Sept., 1877.) An order of reference made on consent, in an action at law, provided that the cause be referred to H., to hear and determine all the issues thereof, and that the report of the referee have the same effect as a judgment of the court, and that, on filing such report with the clerk of the court, judgment be entered in conformity therewith, "the same as if the cause had been tried before the court." On the report, judgment was entered for the defendant for costs. The plaintiff moved for a stay of proceedings, under sec. 987 of the Revised Statutes, with a view of applying to the court to grant a new trial. *Held*, that the court had no power to grant a new trial. *Neafie v. Cheesebrough*, 14 Blatchf. 313.

26. (March, 1878.) The trial before a jury of an action at law, in this court, occupied nearly four months, being portions of three terms of the court. After the final adjournment of the

term at which the verdict was rendered, which was for the defendant, a stay on the verdict was granted, and, by order, the time for the plaintiff to make a case was extended, and the stay was continued, by order, until the hearing and decision on a motion for a new trial. *Held*, that the motion for a new trial on a case before judgment could be entertained after the expiration of the term at which the action was tried, and that the practice pursued was regular. *Emma Silver Mining Co. v. Park*, 14 Blatchf. 411.

27. (Sept., 1878.) In an action of assumpsit by the United States against O. and K. and B., K. pleaded the general issue severally, and O. and B. joined in their plea. The cause of action was joint and several. At the trial the plaintiffs made no claim against B. The jury were instructed by the court that B. was entitled to a verdict. The jury found a verdict against O. and K., but made no finding as to B. Before judgment was entered, all the defendants moved in arrest, and to set aside the verdict, and for a new trial, on the ground that the verdict was irregular, because the issue as to B. was not found. *Held*, that, if the plaintiff should discontinue the suit as to B., judgment would be entered against O. and K.; that, on such discontinuance, the motion would be overruled; and that, if a discontinuance was not entered or an amendment not made, B. would be entitled to a new trial, but not the other defendants. *United States v. O'Fallon*, 15 Blatchf. 298.

28. (April, 1879.) After a trial before a referee, under such a stipulation ["to hear, try, and determine the issues therein"], the court has power to grant a new trial. *Robinson v. Mutual Benefit Life Ins. Co.*, 16 Blatchf. 195.

29. (Aug., 1879.) A motion for a new trial because of alleged newly discovered evidence denied, on the ground that such evidence was merely cumulative. *Whalen v. Sheridan*, 17 Blatchf. 9.

30. (Oct., 1879.) After the court has heard and denied a motion for a new trial in a suit at law, and a judgment has been rendered and paid and satisfied, it has no power to grant leave to reargue the motion for a new trial. *Smith v. The Town of Ontario*, 17 Blatchf. 240.

31. (Oct., 1822.) [Debt on a post-office bond, . . . and no breaches laid.] Pleas, *non est factum*, and payment. The jury found against the defendant on the first plea, and a number of

facts which were all inapplicable to the second plea. Judgment was arrested for want of breaches being assigned, and a *venire facias* was awarded for this defect in the verdict. *Postmaster-General v. Cross*, 4 Wash. 326.

32. (Oct., 1880.) Even where error has intervened in the course of the trial, a new trial should not be granted, if upon the whole record the court can clearly see that no injury resulted, and that the verdict is right on other grounds, notwithstanding the error. *North Noonday Mining Co. v. Orient Mining Co.*, 6 Sawyer, 504.

Nonsuit.

1. (Jan., 1828.) The court has had this case under its consideration, and is of opinion that the Circuit Court had no authority to order a peremptory nonsuit against the will of the plaintiff. He had a right by law to a trial by a jury, and to have had the case submitted to them. *Elmore v. Grymes*, 1 Pet. 471, 472.

2. (Jan., 1828.) A nonsuit may not be ordered by the court, in any case, without the consent and acquiescence of the plaintiff. *D' Wolf v. Rabaud*, 1 Pet. 476, 497.

3. (Jan., 1832.) The Circuit Court has no authority whatsoever to order a peremptory nonsuit against the will of the plaintiff. This point has been repeatedly settled by this court, and is not open for controversy. *Crane v. Lessee of Morris*, 6 Pet. 598.

4. (Jan., 1843.) A plaintiff may, in an action in form *ex delicto* against several defendants, enter a *nolle prosequi* against one of them. But in actions in form *ex contractu*, unless the defense be merely in the personal discharge of one of the defendants, a *nolle prosequi* cannot be entered as to one defendant without discharging the other. *United States v. Linn*, 1 How. 104.

5. (Dec., 1852.) The courts of the United States have not power to order a nonsuit against the wishes of the plaintiff. *Silsby v. Foote*, 14 How. 219.

6. (Dec., 1859.) The Circuit Courts of the United States have no power to grant a peremptory nonsuit against the will of the plaintiff. *Castle v. Bullard*, 23 How. 172, 183.

7. And where there are several defendants against whom the charge is joint and several, there cannot be, at common law, a nonsuit as to one and verdict against the others, although the verdict may be against one and in favor of the others. *Ib.*

8. And, besides, in this case there was evidence for the jury to say whether the party in whose favor the nonsuit was prayed was guilty or not. *Ib.*

9. (Oct., 1838.) *Semble*, that a *nolle prosequi* may be entered at any time before verdict, whether the defendants unite or sever in their pleas. *Tobey v. Clafin*, 3 Sumn. 379.

10. (May, 1846.) A nonsuit not the result of a judgment of the court is no bar to a subsequent libel for the same cause of complaint. *Jay v. Almy*, 1 Woodb. & M. 263.

11. (Oct., 1849.) On the trial of a cause before a jury, this court has no power to grant a nonsuit against the will of the plaintiff. *Foote v. Silsby*, 1 Blatchf. 445.

12. (Oct., 1862.) A court of the United States is not empowered to grant a nonsuit in a case where evidence has been taken. *Boucicault v. Fox*, 5 Blatchf. 87.

13. (April, 1817.) Want of proper averments in the declaration cannot be made the ground of a nonsuit. *Bas v. Steel*, Pet. C. C. 406.

Notice of Trial.

1. (April, 1816.) If a cause has been continued from term to term by consent, it is the duty of the parties to be ready for trial at any subsequent time. And notice that it is intended to try the cause is not required from either party. *The King of Spain v. Oliver*, Pet. C. C. 217.

Payment into Court.

1. (June, 1873.) Where the declaration contains the general counts, in addition to a special count which may contain many causes of action, the payment of money into court, generally upon the whole declaration, is not an admission of the defendant's liability upon the special count. *Snow v. Miles*, 3 Cliff. 608.

2. By such payment the defendant does not admit any specific contract. The only effect is, that he admits a liability on some one or more of the causes of action set out in the declaration, not exceeding the amount paid into court. *Ib.*

3. (May, 1880.) The defendant was ordered to pay the recovery [for infringement of a patent] to the clerk of the court,

for the benefit of those entitled to it. *Campbell v. James*, 18 Blatchf. 93.

4. (Aug. 1858.) Where the marshal has money in his hands, the balance of proceeds of sale of property, claimed by a party other than the execution debtor, and to recover which such party has brought suit against the marshal, the court will not order him to pay the money into court pending such suit, there being no proof of collusion or danger of loss. *Day v. Emerson*, 5 Biss. 56.

Practice. Miscellaneous.

1. (Feb., 1804.) A party may take advantage of an error in his favor, if it be an error of the court. *Capron v. Van Noorden*, 2 Cranch, 125.

2. (Feb., 1823.) The wager of law, if it ever had a legal existence in the United States, is now completely abolished. *Childress v. Emory*, 8 Wheat. 642.

3. (Jan., 1834.) No practice of the Circuit Court, inconsistent with the rules of practice established by this court, for the Circuit Courts, can be admissible to control them. *Bank of United States v. White*, 8 Pet. 262.

4. (Jan., 1840.) The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the practice of the Circuit Courts, with which the Supreme Court ought not to interfere, unless it shall choose to prescribe some fixed general rules on the subject, under the authority of the act of Congress. The Circuit Courts possess this discretion in as ample a manner as other judicial tribunals. *Philadelphia & Trenton Railroad Co. v. Stimpson*, 14 Pet. 449.

5. (Oct., 1873.) The practice, pleadings, and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of the territorial assemblies, and to the regulations which might be adopted by the courts themselves. In case of any difficulties arising out of this state of things, Congress has it in its power at any time to establish such regulations on this, as well as on any other subject of legislation, as it shall deem expedient and proper. *Hornbuckle v. Tombs*, 18 Wall. 648.

6. The cases of *Noonan v. Lee* (2 Black, 499), *Orchard v.*

Hughes (1 Wall. 77), and *Dunphy v. Kleinsmith* (11 id. 610) reconsidered, and not approved. *Ib.*

7. (Oct., 1873.) The preceding case [of *Hornbuckle v. Tombs*] affirmed, the case here having been a proceeding to obtain satisfaction of a mortgage. *Hershfield v. Griffith*, 18 Wall. 657.

8. (Oct., 1873.) The case of *Hornbuckle v. Tombs* (*supra*, p. 648) affirmed. *Davis v. Bilsland*, 18 Wall. 659.

9. (Oct., 1875.) Where proceedings for the condemnation of land are brought in the courts of Ohio, the statute of that state treats all the owners of a parcel of ground as one party, and gives them collectively a trial separate from the trial of the issues between the government and the owners of other parcels; but each owner of an estate or interest in each parcel is not entitled to a separate trial. *Kohl v. United States*, 1 Otto, 367.

10. (Oct., 1875.) Where the judgment in favor of the defendants, upon a special finding by the Circuit Court, embracing only part of the issues, was reversed here, and the case remanded "with instructions to proceed in conformity with the opinion," — *Held*, that the court below is precluded from adjudging in favor of the defendants, upon the facts set forth in that finding, but can in all other respects proceed in such manner as, in its opinion, justice may require. *Ex parte French*, 1 Otto, 423.

11. (Oct., 1875.) Where moneys belonging to the registry of the court are withdrawn from it without authority of law, the court can, by summary proceedings, compel their restitution; and any one entitled to the moneys may apply to the court by petition for a delivery of them to him. *Osborn v. United States*, 1 Otto, 474.

12. (Oct., 1876.) A plaintiff is bound to state his case, but not the evidence by which he intends to prove it. *Indianapolis & St. Louis Railroad Co. v. Horst*, 3 Otto, 291.

13. (Oct., 1878.) In such an action [upon a contract], the court cannot, unless so authorized by statute, compel the plaintiff to accept, in mitigation of damages, when tendered to him by the defendant in open court, the property for the non-delivery of which the action was brought. *Colby v. Reed*, 9 Otto, 560.

14. (Jan., 1878.) A party cannot wait until evidence is given, and the case of the other side is closed, and then produce a stipulation as ground for striking out such evidence. *United States v. Graff*, 14 Blatchf. 382.

15. (1873.) Mere technical objections, taken for the first time in the appellate court, are unavailing. Judiciary Act, sec. 32, applied. *Babbitt v. Burgess*, 2 Dill. 169.

Presumption.

1. (Dec., 1872.) Notices required by statute presumed to have been given by a probate judge, he having made a conveyance of land which could have been properly made only after such notices given. *Cofield v. McClelland*, 16 Wall. 331.

Publication of Notices.

1. (Dec., 1870.) The provisions of the Code of Procedure of Louisiana concerning sales of real estate under execution require that the sale shall be advertised in a newspaper published in the parish where the land is situated. *Moncure v. Zunts*, 11 Wall. 416.

2. The policy of Congress, as shown by numerous statutes, has been to adopt for the several courts, in suits at common law, the processes and modes of proceeding of the state courts in which they are held. *Id.*

3. The act of May 26, 1824 (4 Stat. at Large, 62), not only adopts the mode of proceedings then established in the State of Louisiana, but requires the federal courts to conform to such changes as may be made in that state, and limits very materially the power of the federal courts to modify or change those rules, as that power exists in the courts of other districts. *Id.*

4. The seventh section of the act of Congress of March 2, 1867 (14 Stat. at Large, 466), applies only to such advertisements as may be published in behalf of the government, and are to be paid for out of the federal treasury. It does not affect advertisements for sale of lands under judicial process, in suits between individuals. *Id.*

5. A sale of lands in such cases, under execution from the federal court in Louisiana, should be set aside, in a proper proceeding for that purpose, when it has not been advertised in a newspaper of the parish, and when there is a paper published in such parish. *Id.*

6. (Oct., 1878.) Where the decree required notice of the sale

of the property to be advertised in certain newspapers, among which was A., printed in a certain city, and it appearing that, before such advertisement was made, A. had been merged into B., or that its name had been changed to B.,—*Held*, that, the identity of the paper remaining, the advertisement in B. was a substantial compliance with the order. *Sage v. Central Railroad Co.*, 9 Otto, 335.

7. (Oct., 1879.) *Held*, 1. That the publication of notice of the hearing is only intended for the protection of parties having adversary interests in the property, and is not essential to the jurisdiction of the court. 2. That, so far as the rights of the lunatic are concerned, the jurisdiction of the court attached upon filing of the guardian's petition setting forth the facts required by the statute. 3. That, as against the lunatic, a license to sell is not rendered invalid by reason of an insufficient publication of notice of the hearing. 4. The rulings in *Grignon's Lessee v. Astor* (2 How. 319) and *Comstock v. Crawford* (3 Wall. 396) cited on this latter point. *Mohr v. Manierre*, 11 Otto, 418.

Records. Restoring.

1. (Dec., 1855.) An original writ has fulfilled its functions when the defendant is brought into court. If lost, the court can provide, in its discretion, for the filing of a copy. *York & Cumberland Railroad Co. v. Myers*, 18 How. 246.

2. (Oct., 1879.) The court below properly allowed the plaintiff to file in the case a new petition, not differing in any substantial particular from the original, which was lost, without his fault. *Phillips v. Moore*, 10 Otto, 208.

3. (July, 1872.) The proceedings to restore records in the United States courts must conform to the act of Congress and not to the state statute. *Turner v. Newman*, 3 Biss. 307.

Referee.

1. (Dec., 1864.) References to persons noways connected with the bench, to hear and determine all the issues in a case, are ancient and usual; and in the federal courts, as in others, proper, if the case referred be of a kind for assistance of that sort. *Heckers v. Fowler*, 2 Wall. 123.

2. Entry of judgment by the clerk, on the return of the report of such referee, is regular, and is a judgment of the court, though made without any presence or action of the court itself. *Ib.*

3. A reference, with the direction "to *hear and determine* all the issues" in a case, does not require the referee to *report* them all. It is answered by his reporting the sum due, after hearing all the issues. *Ib.*

4. (Oct., 1878.) The power, with the consent of the parties, to appoint referees, and refer to them a pending cause, is incident to all judicial administration, where the right exists to ascertain the facts as well as to pronounce the law. *Newcomb v. Wood*, 7 Otto, 581.

5. Any issues in an action, whether they be of fact or of law, may be so referred by sec. 281 of the Code of Ohio. *Ib.*

6. (June, 1876.) On a consent given in open court, a reference of an action at law was made to a referee to hear and determine all the issues therein. The referee found for the plaintiff for a sum certain, and a judgment was entered on the report without any application to the court. The report was, by a clerical error, entitled in the District Court, but it was filed in the Circuit Court, and was proceeded upon as if it had been correctly entitled. There was no other cause pending between the same parties, and no one was misled by the mistake. The defendant moved to set aside the judgment. *Held*,—

(1.) That the mistake as to the entitling might be disregarded or amended *nunc pro tunc*.

(2.) That it was not irregular to enter the judgment without an application to the court, such being the practice of the courts of the state. *Fourth National Bank v. Neyhardt*, 13 Blatchf. 393.

7. Suggestions as to the proper mode of obtaining a review of the decision of a referee, where a judgment is entered on his report without having been presented to, or considered by, the court. *Ib.*

8. (Dec., 1878.) This court has no authority to refer a suit at common law to a referee for trial, without the consent of both parties to the suit. *Howe Machine Co. v. Edwards*, 15 Blatchf. 402.

9. Such authority is not conferred by sec. 5 of the act of June 1, 1872 (17 Stat. at Large, 197) now sec. 914 of the Revised Statutes of the United States, although, in a like suit in the

courts of the State of New York, there might be such a reference without the consent of both parties. *Ib.*

10. (Jan., 1879.) On a writ of error to the District Court, where the judgment of that court is based on the report of a referee, the findings of fact made by the referee are conclusive, in this court, and only his conclusions of law can be questioned, and that only so far as they are challenged by exceptions filed in the District Court. *Sicard v. Buffalo, New York, & Philadelphia Railway Co.*, 15 Blatchf. 525.

11. (April, 1879.) When the parties to an action at law have stipulated in writing to refer it to a referee, "to hear, try, and determine the issues therein, and that an order may be entered accordingly," and, without such order being entered, the trial before the referee has been had, and he has made his report, such order will be considered as having been entered, and may be entered *nunc pro tunc*. *Robinson v. Mutual Benefit Life Ins. Co.*, 16 Blatchf. 194.

12. The stipulation is to be regarded as referring to the practice of the courts of the state in respect to references by consent. *Ib.*

13. A reference, by consent, of such an action, in this court, is lawful. *Ib.*

14. (Nov., 1880.) The finding of a referee as to a fact, on the trial before him of the issues in an action at law, will not be disturbed except in a case where the finding of a jury on the same questions would be disturbed. *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. 368.

15. (Jan., 1881.) An action of assumpsit, referred by consent of parties, can be heard by the court on questions submitted by the report of the referee. *Heath v. Griswold*, 18 Blatchf. 555.

Remedy.

1. (Jan., 1848.) As to the form of action, none will lie, at common law, against an executor, where the general issue plea is "not guilty." *United States v. Daniel*, 6 How. 11.

2. (Jan., 1850.) By the laws of Wisconsin, where the contract in question was made, a scroll, or any device by way of seal, has the same effect as an actual seal. But in New York it is otherwise; and an action brought in New York, upon such an instru-

ment, must be an action appropriate to unsealed instruments. *Le Roy v. Beard*, 8 How. 451.

3. Therefore, where a deed was executed with a scroll, in Wisconsin, which contained a covenant of seisin, and an action was brought in New York, for a breach of this, it was properly an action of assumpsit, and not covenant. *Ib.*

4. (Dec., 1870.) *Audita querela* does not lie where the party has had a legal opportunity of defense and neglected it. *Avery v. United States*, 12 Wall. 304.

5. Nor in any case against the United States. *Ib.*

6. (Oct., 1878.) An action of debt cannot be maintained by the United States to recover the penalties prescribed by the fourth section of the act of Congress approved July 18, 1866 (14 Stat. 179), entitled "An Act to prevent smuggling, and for other purposes." That act contemplated a criminal proceeding, and not a civil remedy. *United States v. Claflin*, 7 Otto, 546.

7. Nor does sec. 3082 of the Revised Statutes authorize a civil action. *Ib.*

Remittitur.

1. (Dec., 1872.) Where, after judgment for a certain sum, a *remittitur* is entered as to part, the *remittitur* does not bind the party making it, if the judgment be vacated and set aside. *Planters' Bank v. Union Bank*, 16 Wall. 483.

Res Judicata.

1. (Feb., 1814.) The acts of a tribunal, upon a subject not within its jurisdiction, are void. *Griffith v. Frazier*, 8 Cranch, 10.

2. (March, 1825.) The courts of the United States are courts of *limited*, but not of *inferior*, jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees may be reversed for that cause, on a writ of error and appeal; but, until reversed, they are conclusive evidence between parties and privies. *McCormick v. Sullivan*, 10 Wheat. 192.

3. A judgment of those courts may be reversed for want of jurisdiction appearing on the face of the proceedings; but, until so reversed, is conclusive as a *res adjudicata*. *McCormick v. Sullivan*, 10 Wheat. 199.

4. (Jan., 1830.) It is universally understood that the judg-

ments of the courts of the United States, although their jurisdiction be not shown on the pleadings, are yet binding on all the world, and that this apparent want of jurisdiction can avail the party only on a writ of error. *Ex parte Tobias Watkins*, 3 Pet. 194.

5. (Jan., 1844.) Under the statute of Maryland, passed in 1785 (1 Maxcy's Laws, ch. 72), the chancellor can decree a sale of land upon the application of only a part of the heirs interested; and as he had jurisdiction, the record must be received as conclusive of the rights adjudicated. *Shriver v. Lynn*, 2 How. 43.

6. (Jan., 1845.) The doctrine of this court in 1 Peters, 340, reviewed and confirmed, viz., "that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceedings." *Hickey v. Stewart*, 3 How. 750.

7. (Jan., 1849.) The instrument had been declared void by a court of competent jurisdiction, and neither the parties nor their privies could recover upon it. *Smith v. Kernochen*, 7 How. 198.

8. There is no difference upon this point between a decree in chancery and a verdict at law. Either constitutes a bar to a future action upon the instrument declared to be void. The authorities upon this point examined. *Ib.*

9. (Jan., 1850.) But it is a well-settled rule in jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter, by a party claiming the benefit of such proceedings. *Williamson v. Berry*, 8 How. 495.

10. (Dec., 1859.) The parish court of New Orleans had exclusive jurisdiction over property ceded by insolvents, and the courts of the United States have no jurisdiction over such insolvencies. *Adams v. Preston*, 22 How. 473.

11. An allegation of fraud, in a bill filed to review such proceedings in insolvency, which was afterwards abandoned, is not sufficient to give the Circuit Court jurisdiction to review the proceedings of the state court. *Ib.*

12. (Dec., 1860.) After the mandate went down to the Circuit Court, in the case of *Ballance v. Forsyth* (13 How. 18), Ballance filed a bill upon the equity side of the court, setting forth the same titles which were involved in the suit at law, and praying relief.

It was not allowable for him to appeal from the judgment of the Circuit Court and Supreme Court, to a court of chancery, upon the merits of the legal titles involved in the controversy they had adjudicated. *Ballance v. Forsyth*, 24 How. 183.

13. The objections to the title of his adversary should have been urged upon the trial of the suit at law; and if they are founded upon alleged errors in the location and survey, all such questions are administrative in their character, and must be disposed of in the land-office. *Ib.*

14. (Dec., 1862.) A controversy once decided by a competent tribunal cannot be re-examined by another court of concurrent jurisdiction, in a suit between the same parties or their privies. *Parrish v. Ferris*, 2 Black, 606.

15. The Statute of Ohio authorizes any person in possession of real property to institute a suit against any one who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest. *Ib.*

16. The judgment of a court, in proceedings under this statute, determines the merits of the plaintiff's title, as well as that of the defendant; and is conclusive, whether adverse to one or the other. *Ib.*

17. (Dec., 1868.) A decree dismissing a bill in an equity suit, in the Circuit Court of the United States, which is absolute in its terms, unless made upon some ground which does not go to the merits, is a final determination of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. *Durant v. Essex Company*, 7 Wall. 107.

18. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits. *Ib.*

19. (Dec., 1869.) A judgment recovered in the Common Pleas, at Westminster, England, against a person in the United States, without any service of process on him, or any notice of the suit other than a personal one served on him in this country, has no validity here, even of a *prima facie* character. *Bischoff v. Wethered*, 9 Wall. 812.

20. (Dec., 1872.) Where jurisdiction has attached, whatever errors may occur subsequently in its exercise, the proceeding

being *coram judice*, cannot be impeached collaterally, except for fraud. *McNitt v. Turner*, 16 Wall. 353.

21. (Oct., 1873.) Neither the constitutional provision, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. *Thompson v. Whitman*, 18 Wall. 457.

22. The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist. *Ib.*

23. Want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing. *Ib.*

24. By a law of New Jersey, non-residents were prohibited from taking clams and oysters in the waters of that state, under penalty of forfeiture of the vessel employed; and any two justices of the county in which the seizure of the vessel should be made, were authorized, on information given, to hear and determine the case. *Held*, that if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction; and that this fact might be inquired into, in an action for making such seizure, brought in New York, notwithstanding the record of a conviction was produced, which stated that the seizure was made within such county. *Ib.*

25. (Oct., 1873.) A return to a summons by the sheriff, that he has served the defendant personally therewith, is sufficient, without stating that the service was made in his county. This will be presumed. *Knowles v. Gaslight & Coke Co.*, 19 Wall. 58.

26. But, in an action on a judgment rendered in another state, the defendant, notwithstanding the record shows a return of the sheriff that he was personally served with process, may show the contrary, namely, that he was not served, and that the court never acquired jurisdiction of his person. The case of *Thompson v. Whitman* (18 Wall. 457) affirmed and applied. *Ib.*

27. (Oct., 1873.) A corporation of New York was declared to be "dissolved," by one of its courts, acting in professed conformity to a statute of the state; and receivers of its assets were

appointed. A creditor of the corporation, residing in another state sued it there, in "trustee process" (foreign attachment), by which he attached debts due by certain persons (known in the language of the process as "trustees") to the corporation. The corporation, the receivers, and the trustees all appeared by attorney; the trustees answered, and after the corporation and the receivers had contested the claim of the plaintiff so long as they could, the receivers withdrew their opposition, and a formal judgment was entered, which recited that the trustees were charged, on their answer.

To a *scire facias* against the trustees, to have execution on this judgment, the trustees pleaded that the corporation had been dissolved by a court of New York, to whose proceedings full faith and credit were due, under the Constitution. The court below decided that the court of New York had acted in excess of its jurisdiction, and therefore that faith and credit were not due to its proceedings. This decision being the only error assigned, the judgment below was affirmed; this court holding that, whether the judgment below was right or wrong was not a matter which concerned the trustees; since the fact of their debt and their obligation to pay it were admitted, and since in the original suit, where the corporation, the receivers, and the trustees were parties, judgment, after full hearing, and with consent of the receivers, had been entered against the corporation, and the "trustees charged." *Habich v. Folger*, 20 Wall. 1.

28. (Oct., 1874.) In a suit upon a judgment of a sister state, objections to the form and sufficiency of the evidence offered, to prove the record on which the action is brought, cannot be sustained; the document offered being properly certified to be "a true and faithful copy of the record of the proceedings had in the cause." *Maxwell v. Stewart*, 21 Wall. 71.

29. Nor is it a valid objection against the jurisdiction of the court rendering the judgment, that the record shows that the cause was tried without the intervention of a jury, and did not show that a jury had been waived, as provided by statute. *Ib.*

30. (Oct., 1876.) A court of equity cannot act as a court of review, and correct errors of a court of law; nor can it, in the absence of fraud, collaterally question the conclusiveness of a judgment at law. *Tilton v. Cofield*, 3 Otto, 163.

31. (Oct., 1877.) The doings of a county court of Missouri

can be shown only by its record. *County of Macon v. Shores*, 7 Otto, 272.

32. (Oct., 1877.) Assumpsit against an insurance company upon a life policy. Plea, *non assumpsit*, with an agreement that either party might introduce any matter in evidence which would be legally admissible if it had been specially pleaded. Leave was subsequently granted the defendant to file a plea of *puis darrein continuance*. There was also an agreement which provided for the admission of the record of a suit in equity then pending in the Supreme Court of New York, whereto the parties hereto, and others claiming the benefit of the policy, were parties, and stipulated that any further proceedings therein might be filed as a part of the agreement at any time before the trial of this action. A decree was rendered by said court November 26 that the company pay the full amount of the policy to the credit of the suit, for the benefit of such of the other parties as should be found to be thereto entitled, and that upon such payment the company be released and discharged from further liability on said policy, and that the several claimants be enjoined from suing thereon. The amount was thereupon forthwith paid into court. On the 25th of November the plaintiff stated his case, whereupon the hearing was postponed until the 29th of that month, when the defendant, no evidence having as yet been submitted, filed with the clerk of the court a duly certified transcript of said decree. On the trial, leave was refused the defendant to set up the matter of that suit and decree by way of plea, or put it in evidence, under the agreement. *Held*, that the decree was a final determination of the claim of the plaintiff below, and should have been admitted as matter of evidence, having the same force and effect in a court of the United States as in the courts of New York. *Insurance Co. v. Harris*, 7 Otto, 331.

33. (Oct., 1878.) Where, pursuant to the authority vested in him by chapter 907 of the laws of New York, passed May 18, 1869, and the several laws amendatory thereof, the county judge renders judgment, declaring that the conditions have been performed whereon a town in the county can lawfully subscribe for shares of the capital stock of a railroad company in that state, and issue its bonds to pay therefor, — *Held*, that the judgment, until reversed by a higher court, is conclusive. *Orleans v. Platt*, 9 Otto, 676.

34. (Oct., 1878.) The ruling in *Orleans v. Platt* (*supra*, p. 676), as to the jurisdiction of the county judge in New York, to decide upon the application made to him by the taxpayers of a town for an order that its bonds be issued to enable it to subscribe and pay for shares of the capital stock of a railroad company in that state, reaffirmed and applied to this case. *Lyons v. Munson*, 9 Otto, 684.

35. His judgment in favor of the subscription cannot be collaterally attacked in a suit on the bonds, brought by a *bona fide* holder, for value of them against the town; and where it is recited in them, the town is estopped from denying their validity. *Id.*

36. (Oct., 1879.) The Circuit Court of the United States cannot revise or set aside the final decree rendered by a state court which had complete jurisdiction of the parties and subject-matter. *Nouqué v. Clapp*, 11 Otto, 551.

37. (Oct., 1838.) The sentence of a foreign court of competent jurisdiction, acting *in rem*, is conclusive in respect to the matter on which it directly decides. *Peters v. Warren Ins. Co.*, 3 Sumn. 389.

38. (Oct., 1810.) A judgment in a state court is conclusive in every other state, and extinguishes the original ground of action. *Green v. Sarmiento*, Pet. C. C. 74.

39. (April, 1816.) The dismissal of a bill in chancery is not conclusive against the complainant in a court of law, although the bill may have been brought for the same matter. The decision of a court of *competent jurisdiction*, directly upon the same point is conclusive, whenever it may again come in question. *Lessee of Wright v. Deklyne*, Pet. C. C. 199.

40. (April, 1808.) B. pledged a vessel to P. to secure a sum of money loaned, and she was afterwards attached by another creditor of B. in the State of Delaware, and there sold under legal proceedings, P. becoming the purchaser; and after repairing her at some cost, he brought her to Philadelphia, where the plaintiff instituted this action of trover for her recovery. *Held*, that the regularity of the proceedings in Delaware, under which the vessel was sold, cannot be inquired into in this issue. *Barker v. Parkenhorn*, 2 Wash. 142.

41. (April, 1827.) The decree of the Orphans' Court in Pennsylvania of a deceased guardian's account, the subsequent

guardian of the infant being a party to the controversy, is conclusive, and a complete bar to a bill in equity in any other court. *Blount v. Darrach*, 4 Wash. 657.

42. The doctrine of the conclusiveness and effect of judgments and decrees in courts of peculiar jurisdiction, and others, examined and stated. *Ib.*

43. (Oct., 1827.) Where a matter is adjudicated by a court of peculiar and exclusive jurisdiction, the sentence is conclusive, when the same matter comes incidentally before another court, as to the matter decided, not only between the same parties, but strangers, unless it can be impeached for fraud. *Lessee of Rhoades et al. v. Selin*, 4 Wash. 716.

44. The difference between the sentence of a court of exclusive and concurrent jurisdiction, as to its binding effect on another court. *Ib.*

45. (Nov., 1876.) Fraud practiced in the recovery of a judgment cannot be pleaded in an action on the judgment, prosecuted in another state, unless such defense could be made in the courts of the state where the judgment was rendered. *Barras v. Bidwell*, 3 Woods, 5.

46. (Nov., 1876.) To maintain the plea of *res judicata*, the judgment must be final; if it is open to appeal, the plea will not hold. *New Orleans National Bank v. Adams*, 3 Woods, 21.

47. (April, 1867.) The judgment of a court of record cannot be collaterally impeached; and the plea that the judgment set forth in the record on which this suit is brought was obtained "by fraud, duress," &c., is bad, and a demurrer to it will be sustained. *Randolph v. King*, 2 Bond, 104.

48. (April, 1872.) The Circuit Courts of the United States are not constituted to review and reverse the proceedings and judgments of state courts. It is the duty of the federal courts to give full faith and credit to the judicial proceedings and records of state tribunals. *Amory v. Amory*, 3 Biss. 266.

49. (April, 1877.) Where the jurisdiction of a court of special authority appears upon the record, its action and decision can no more be collaterally inquired into than can the action and decision of a court that has authority over all questions and controversies. *Mohr v. Manierre*, 7 Biss. 419.

50. (1880.) Where an action is pending in a state court of competent jurisdiction to enforce a specific lien on property of the

debtor, the subsequent bankruptcy of the debtor does not divest the state court of its jurisdiction to proceed to a final decree in the cause, and execute the same. The assignee in bankruptcy may intervene in such action; but the jurisdiction of the state court and the validity of its decree is not affected by his failure to do so. *Kimberling v. Hartly*, 1 McCrary, 136.

51. (Sept., 1870.) On a collateral attack upon a judgment of a Superior Court, that court will be conclusively presumed to have acquired jurisdiction, unless the record on its face affirmatively shows want of jurisdiction. *Galpin v. Page*, 1 Sawyer, 309.

52. If the record of a Superior Court is silent as to the proof of a jurisdictional fact, on a collateral attack, due proof of the fact will be presumed in support of the judgment. *Ib.*

53. The recital of a jurisdictional fact, there being nothing to the contrary in the record, is conclusive evidence, in a collateral proceeding, of the determination of the fact upon sufficient evidence, although the evidence does not appear in the record. *Ib.*

54. (Aug., 1874.) In all cases the jurisdiction of a state court may be inquired into, when its judgment is made the foundation of a claim in the Circuit Court; but the inquiry can proceed no further. The jurisdiction existing, the merits of the controversy involved are not open to examination. *Galpin v. Page*, 3 Sawyer, 93.

55. There is no presumption in favor of the judgments of courts of general jurisdiction, except as to matters and persons falling within the scope of that general jurisdiction. When the proceeding is special, and outside of that general scope, either as to subjects or persons, the presumption ceases, and the record must show a compliance with the special authority by which the extraordinary jurisdiction is exercised. *Ib.*

56. (March, 1875.) The common-law presumption in favor of the jurisdiction and regularity of the proceedings of courts of record of general jurisdiction had its origin in the fact that at common law no judgment could be given against a defendant until he had appeared in the action; but no such presumption does or ought to apply in cases where the defendant is a non-resident, and there was no appearance and only constructive service of the summons by publication. *Neff v. Pennoyer*, 3 Sawyer, 275.

Return of Process.

1. (Feb., 1806.) To support a judgment on a collector's bond at the return term, it must appear by the record that the writ was executed fourteen days before the return-day. *Dobyness v. United States*, 3 Cranch, 241.

2. (Feb., 1812.) If the marshal of Virginia return that the defendant is no inhabitant of the district of Virginia, the suit shall abate as to such defendant. *Barton v. Petit*, 7 Cranch, 194.

3. (Oct., 1874.) Where a return in a record, purporting to be a sheriff's return to a *feri facias*, alleges that, under a proceeding to foreclose a mortgage, the sheriff seized the mortgaged premises, but does not purport to be signed by the sheriff, the return is traversable; and if the law requires an actual seizure, it may be shown that none was made. *Watson v. Bondurant*, 21 Wall. 123.

4. (Oct., 1876.) Under the laws of Louisiana, sureties in an appeal bond, which operates as a *supersedeas*, are liable by a summary proceeding to judgment, after execution on the original judgment has been issued, and a return of *nulla bona* made by the proper officer. *Smith v. Gaines*, 3 Otto, 341.

5. The officer who made this return cannot be compelled to amend or modify it; nor can its truth be questioned in the subsequent proceeding against the sureties. *Ib.*

6. (April, 1815.) The court will not dictate to the marshal what return he shall make to process in his hands. He must make his return at his peril, and any person injured by it may have his legal remedy for such return. *Wortman v. Conyngham*, Pet. C. C. 241.

7. It is not a sufficient return to a *venditioni exponas* "that A. B., to whom the property was struck off at the sale, has neglected and refused to comply with the terms of sale." It is the duty of the marshal to offer the property at sale again if he had time to do so, and, if not, by a proper return, enable the plaintiff to take out an *alias venditioni exponas*. *Ib.*

8. After the marshal is commanded by the writ to bring the money, the proceeds of a sale, into court, he may pay it to the plaintiff on the execution, on his responsibility for the right of the plaintiff to receive it. *Ib.*

9. The court will not interfere in a summary way to distribute

money, the proceeds of an execution, or decide on the rights of those who claim it, unless the money be paid into court. *Ib.*

10. *Quære*, if the purchaser of property, sold under a *venditioni exponas*, may pay the plaintiff in the execution. *Ib.*

11. (Oct., 1808.) After a rule on the marshal to return the *capias ad satisfaciendum*, issued against the defendants, and the return of the marshal that the plaintiff had directed him not to serve the writ on one defendant, and that the other could not be found, the court have nothing more to do with the rule. If the marshal has misconducted himself, the remedy is an action for a false return. *Segourney v. Ingraham*, 2 Wash. 336.

12. (Nov., 1877.) The return of an officer touching any fact about which he was bound to make return is conclusive on the parties to the suit and their privies. *Von Roy v. Blackman*, 3 Woods, 98.

13. The return of an officer of a fact which necessarily involves an opinion, is no exception to this rule. *Ib.*

14. It is the duty of a court to take notice of the sufficiency of the returns of its officers. *Ib.*

15. A return of a subpœna in equity, which declared that the subpœna had been handed to a person at the domicile of the defendant, and who resided at said domicile, the defendant being absent, is not a sufficient return of service. *Ib.*

16. The return, where the service is by leaving a copy of the subpœna at the dwelling-house, or usual place of abode of the defendant, must show that the copy was handed to a member of or resident in the family of the defendant. *Ib.*

17. (Dec., 1860.) The return of a United States marshal is conclusive of the facts which it sets forth, and its truth cannot be collaterally impeached. *Crane v. McCoy*, 1 Bond, 422.

18. (Aug., 1879.) In the absence of legislation to the contrary, a court has the discretion to permit an officer to amend a return with or without notice, and at any time after the date thereof, so as to bind the parties to the action, or those claiming under them as privies. *Rickards v. Ladd*, 6 Sawyer, 40.

19. But a court cannot authorize a return to be amended so as to affect the rights of third persons, acquired in good faith prior to such amendment. *Ib.*

20. An amended return, as between the parties to the action, or their privies, whether made with or without notice, cannot be questioned by them collaterally. *Ib.*

Review of Decisions.

1. (1870.) The Justice of the Supreme Court, sitting alone in the Circuit Court, will not review and set aside an order or judgment made by the district judge, when the latter was alone holding a term of the Circuit Court; and Mr. Justice Miller added that he had "prescribed it as a rule of conduct for himself that the presence of the district judge, and his consent to a review of his decision, would not vary the course to be pursued." *Appleton v. Smith*, 1 Dill. 202.

2. Accordingly, Mr. Justice Miller, holding the Circuit Court alone, overruled a motion to quash an attachment levied on goods, *solely* because a motion involving the same legal proposition was overruled at the preceding term by the district judge who then held the court. *Id.*

3. (March, 1880.) It is well settled in the Eighth Circuit that the rulings of the district judge, while holding the Circuit Court, are not subject to review in the same court by the circuit judge or justice, and the circuit judge will only sit to hear motions for new trials in cases tried in his absence, when the district judge so desires and requests it. *United States v. Biebusch*, 1 McCrary, 42.

Rule.

1. (May, 1855.) Where a time rule has been waived by the parties and no other substituted, some special order must be obtained, on motion, before either party can force the other to proceed. *Mellus v. Howard*, 2 Curt. C. C. 264.

2. (May, 1801.) Motions and affidavits for attachments in civil suits are proceedings on the civil side of the court, until the attachments issue, and are to be entitled with the names of the parties; but as soon as the attachments issue the proceedings are on the criminal side. Rule to show cause set aside, because misentitled. *United States v. Wayne*, Wall. C. C. 134.¹

3. (Oct., 1804.) After the defendant in ejectment has appeared and entered into the common rule, he may take a rule on the plaintiff for trial, or *non pros.*, although the declaration has not been changed, so as to make it against the real defendant.

¹ Second edition.

This is the neglect of the plaintiff, and he cannot take advantage of it. *Lessee of Hurst v. Ker*, 1 Wash. 189.

4. (April, 1808.) Where, on a rule to show their cause of action, the plaintiffs have produced a positive affidavit of debt, the defendant cannot give evidence that a suit for the same cause of action has been instituted in another court. *Post v. Sarmiento*, 2 Wash. 198.

5. (Oct., 1808.) Where no declaration or plea has been filed, a rule to try or *non pros.* cannot be enforced. *Sullivan v. Browne*, 2 Wash. 204.

6. (April, 1814.) Motion for a rule to show cause why execution shall not be stayed, — the defendant claiming that he is entitled to further credits from the United States, which will reduce the amount of the judgment confessed in their favor. *United States v. Wells*, 3 Wash. 245.

7. The court will not even grant a rule to show cause why the motion shall not be granted, unless upon affidavit, stating precisely what credits are claimed, and the nature of them. *Ib.*

Sale. Judicial.

1. (Dec., 1852.) A sale of land by a marshal on a *venditioni exponas*, after he is removed from office and a new marshal appointed and qualified, is not void. *Doolittle v. Bryan*, 14 How. 563.

2. Such sale being returned to the court and confirmed by it on motion, and a deed ordered to be made to the purchaser at the sale by the new marshal, such sale being made is valid. *Ib.*

Service of Process.

1. (April, 1804.) Justices of the Peace of the State of Pennsylvania may receive proof of the service of process of ejectment issuing out of the Circuit Court of the United States. *Huideköper v. Stiles*, 1 Wash. 135.

2. What will be deemed a sufficient service of a declaration in ejectment. *Ib.*

3. (Aug., 1878.) Service of notice or process upon the officer of a railroad company, authorized by its charter or the law to receive service, is good, although such officer may fraudulently

conceal the fact of such service from other officers of the company. *Allen v. Railroad Co.*, 3 Woods, 316.

4. But where such officer fraudulently conceals the service upon him of a motion for the appointment of a receiver of the property and effects of the railroad company, and by means of such concealment the company fails to resist such appointment, and claims that the same is an invasion of its rights, and ought not to have been made, the court will reopen the case and allow the company to move to vacate the appointment. *Ib.*

5. (May, 1832.) In a suit against an infant, a notice should be served on him, and a guardian *ad litem* appointed by the court. *Carrington's Heirs v. Brents*, 1 McLean, 167.

6. (June, 1873.) Since the act of Congress of June 1, 1872, the process of the federal courts must be served in the manner prescribed by the state law, and this court has no power to prescribe or substitute any other mode. *Perkins v. City of Watertown*, 5 Biss. 320.

7. Service upon the mayor-elect, before acceptance or qualification, is not a service upon the mayor of the city. The fact that there was no mayor or acting mayor upon whom service could be made, does not augment the power of the court. *Ib.*

Special Bail.

1. (April, 1795.) PATTERSON, Justice. The grounds of vexation in this case do not appear to me to be such as to justify the refusal of bail; and every case of this nature must be decided upon its own circumstances. I shall always, indeed, be a friend to the practice of holding to bail, wherever there is a probable cause of action. Here the cause of action is apparent; and though it may be liable to a reasonable controversy, or may be refuted upon a trial, we ought not to investigate the merits at this stage, further than to ascertain what probability there exists in support of the plaintiff's claim. . . .

PETERS, Justice. . . . I perfectly concur in the sentiments which have been delivered by Judge Patterson. *Parasset v. Gautier*, 2 Dall. 330, 332.

2. (Jan., 1827.) The bail is fixed by the death of the principal after the return of the *ca. sa.* and before the return of the *scire facias*; and the bail is not entitled to an *exoneretur* in such a case. *Davidson v. Taylor*, 12 Wheat. 604.

3. (Dec., 1851.) In Maryland it is correct to take a recognizance of bail before two justices of the peace. *Morsell v. Hall*, 13 How. 212.

4. (July, 1834.) Where the defendants are not liable to be imprisoned on the judgment, the special bail is not bound to surrender them in his discharge. *Beers v. Haughton*, 1 McLean, 226.

State Courts. Decisions.

1. (Dec., 1851.) The courts of the United States, under the Constitution and laws, have equity jurisdiction. Unless the general principles of equity have been modified by the laws or usages of a particular state, those general principles will be carried out everywhere in the same manner, and equity jurisprudence be the same, when administered by the courts of the United States, in all the states. *Neves v. Scott*, 13 How. 268.

2. Hence, the decision of a state court, in a case which involved only the general principles of equity, and was not controlled by local law or usage, is not binding as authority upon this court. *Ib.*

3. (Oct., 1879.) The courts of the United States are not bound by the decisions of state courts, upon questions of general commercial law. *Oates v. National Bank*, 10 Otto, 239.

4. (May, 1843.) The courts of the United States follow the decisions of the state tribunals in all questions dependent upon the local statute laws of the states. *Springer v. Foster*, 2 Story, 383.

5. (April, 1874.) A married woman executed a mortgage on her separate estate, to secure her husband's debt, at a time when, according to the decisions of the Supreme Court of the state, such a mortgage was valid. By subsequent decisions of the same court, such a mortgage was declared invalid. *Held*, in a proceeding to enforce the mortgage, that the federal court was bound by the later adjudications of the state Supreme Court. *Mitchell v. Lippincott & Co.*, 2 Woods, 467.

6. (Nov., 1876.) Since the passage of the act of June 1, 1872 (17 Stat. 196), the federal courts will follow the decisions of the state Supreme Court on questions of pleading. *Taylor v. Brigham & Kelly*, 3 Woods, 377.

7. (Jan., 1872.) Where the decision of the highest court of a state, holding an act of the legislature unconstitutional is not

based upon any provision of the state constitution, but upon certain general principles applicable alike, if correct, to all the state governments and that of the United States, the United States courts are not bound to follow such decision. *Talcott v. Township of Pine Grove*, 1 Flipp. 120.

8. Where such decision of the state court is based upon special provisions of the state constitution, it will be followed by the United States courts as to all matters arising subsequent to the state decision. *Ib.*

9. (Oct., 1870.) The established rule is that the federal courts are to administer the laws of the states in cases where they apply ; and the uniform practice has been to consider a judicial interpretation placed upon a statute, the same as if incorporated within the language of the statute itself. *Olcott v. Fond Du Lac County*, 2 Biss. 368.

10. When the highest judicial tribunal of a state has placed a construction upon a statute of the state, that construction will be adopted by this court. *Ib.*

11. (April, 1877.) As to general principles of law, the federal court has the right to follow its own views, and is not bound by the decisions of the state courts. *Mohr v. Manierre*, 7 Biss. 419.

12. (1878.) The Circuit Courts of the United States give effect to the attachment laws of the state, and are bound by the construction placed upon such laws by the Supreme Court of the state. *Lehman v. Berdin*, 5 Dill. 340.

13. (Aug., 1874.) The courts of the United States are not bound by the decisions of the state courts upon questions of general law. They adopt as rules for their judgments only decisions of state courts upon local questions which are peculiar to a state, or adjudications upon the meaning of the constitution or statutes of a state. *Galpin v. Page*, 3 Sawyer, 93.

State Courts of Probate. Exclusive Jurisdiction.

1. (Oct., 1827.) The will of a *feme covert*, under a power reserved in a settlement, must be proved in the Courts of Probate before it can be acted upon elsewhere, exactly as the wills of persons *sui juris*. The Courts of Probate have exclusive jurisdiction of such questions. *Picquet v. Swan*, 4 Mason, 444.

State Courts. Jurisdiction first obtained.

1. (Oct., 1843.) An application was made to the Supreme Court of Maine to allow the execution to be amended by inserting a direction to the sheriff of Aroostook County, on the ground that the clerk had accidentally omitted it, which application the court refused to grant. *Held*, that this court had no authority to review or overrule the decision by the state court, it being in respect of a matter solely of local law. *Kent v. Roberts*, 2 Story, 591.

2. (May, 1845.) This court, as a court of equity, possesses no revisory power over the state courts in the exercise of their jurisdiction. *Tobey v. County of Bristol*, 3 Story, 800.

3. (June, 1852.) When an administrator is in the process of accounting before a Probate Court, he cannot be compelled to account in this court by a bill in equity. *Mallett v. Dexter*, 1 Curt. C. C. 178.

4. (May, 1869.) A suit being in progress in a state court for the settlement of an estate, two of the legatees being non-resident, but having knowledge of this suit, and having been made parties by order of publication, file their bill in the United States Circuit Court to have the estate administered, — *Held*, the latter court has no jurisdiction. *Reid v. Kerfoot*, Chase, 349.

5. (Nov., 1871.) The property of A., consisting of a lease and stock of goods, was seized by the sheriff to satisfy an execution issued out of a state court against the property of B., and on the demand of the sheriff, an indemnity bond for the benefit of A. was furnished by the execution creditor. *Held*, that an action on such bond, or an action of trespass against the sheriff, is not such an adequate and complete remedy at law as would oust the jurisdiction of a court of equity of a bill filed to restrain the sale of the property of A. by the sheriff. *Daly v. The Sheriff*, 1 Woods, 175.

6. But a federal court cannot interfere by injunction to restrain a sale of the property of A. on an execution issued out of a state court against the property of B. *Ib.*

7. (Nov., 1872.) Where two courts have concurrent jurisdiction, the one which first obtains actual jurisdiction of the parties and subject-matter is entitled to proceed to final adjudication, and neither party can be forced into another forum, except as provided by the acts of Congress for the removal of causes from

the state to the federal courts. *Haines v. Carpenter*, 1 Woods, 262.

8. The effect of the case of *Payne v. Hook* (7 Wall. 425) considered. *Ib.*

9. (Nov., 1877.) When property has been seized by a sheriff, by virtue of a writ of replevin issued out of a state court, and released to the defendant upon a forthcoming bond, it is still in the custody of the state court to abide the result of the replevin suit, and not subject to seizure by the marshal, under a writ of replevin subsequently issued out of the United States court, at the suit of the United States. *United States v. Dantzler*, 3 Woods, 719.

10. (March, 1880.) Where, under the "Insurance Act" of the State of Missouri, proceedings have been instituted in the state court against an insurance company, which finally result in the dissolution and administration of the affairs of that company, all intermediate proceedings must be finally disposed of in that tribunal, even though a valid and subsisting judgment was obtained in the federal court against the company pending such administration. *Levi v. Columbia Life Ins. Co.*, 1 McCrary, 34.

State Laws.

1. (Feb., 1819.) Imprisonment of the debtor is no part of the contract, and he may be released from imprisonment without impairing its obligation. *Sturges v. Crowninshield*, 4 Wheat. 200.

2. (Feb., 1825.) Congress has, by the Constitution, exclusive authority to regulate the proceedings in the courts of the United States; and the states have no authority to control those proceedings, except so far as the state process acts are adopted by Congress, or by the courts of the United States under the authority of Congress. *Wayman v. Southard*, 10 Wheat. 1.

3. (Jan., 1840.) The plaintiffs, merchants of New York, instituted a suit in the Circuit Court of Alabama against the administrators of the drawer of a note, dated in New York, and payable in New York. The act of the Assembly of Alabama provides that the estate of a deceased person which is declared to be insolvent shall be distributed by the executors or administrators according to the provisions of the statute among the creditors, and that no suit or action shall be commenced or sustained against

any executor or administrator after the estate of the deceased has been represented as insolvent, except in certain cases not of the description of that on which this suit was instituted. *Held*, that the insolvency of the estate, judicially declared under the statute of Alabama, is not sufficient in law to abate a suit instituted in the Circuit Court of the United States by a citizen of another state against the representatives of a citizen of Alabama. *Suydam v. Broadnax*, 14 Pet. 67.

4. The exceptions in the sixth section of the law of Alabama in favor of debts contracted out of the state prevent the application of the statute, or its operation, in a case of a debt originating in and contracted by the deceased out of the State of Alabama. *Ib.*

5. A sovereign state, and one of the states of this Union, if the latter were not restrained by constitutional prohibitions, might, in virtue of its sovereignty, act upon the contracts of its citizens, wherever made, and discharge them, by denying the right of action upon them in its own courts. But the validity of such contracts as were made out of the sovereignty or state would exist and continue everywhere else, according to the *lex loci contractus*. *Ib.*

6. The constitutional and legal rights of a citizen of the United States to sue in the Circuit Courts of the United States do not permit an act of insolvency completely executed under the authority of a state to be a good bar against a recovery upon a contract made in another state. *Ib.*

7. The eleventh section of the act to establish the judicial courts of the United States carries out the constitutional right of a citizen of one state to sue a citizen of another state in the Circuit Courts of the United States, and gives to the Circuit Courts "original cognizance concurrent with the courts of the several states of all suits of a civil nature, at common law and in equity." It was certainly intended to give to suitors having a right to sue in the Circuit Court remedies coextensive with that right. These remedies would not be so, if any proceedings under an act of state legislation, to which the plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the Circuit Court. *Ib.*

8. (Jan., 1842.) The action cannot be sustained in the Circuit Court jointly against the drawers and indorser of the note. The statute of Mississippi is not in force or effect in the courts of

the United States, the sole authority to regulate the practice of the courts of the United States being in Congress. *Keary v. Farmers' & Merchants' Bank*, 16 Pet. 89.

9. (Jan., 1843.) The law of the State of Alabama, passed in 1821 (ch. 26, s. 5), which authorizes securities to require of the creditor forthwith to put the bond, &c., in suit, against the principal, and absolves the security, unless the creditor commences suit and uses due diligence to collect the debt from the principal, does not include a case where the parties (principal and security) unite in a joint and several sealed bill. *Ellis v. Jones*, 1 How. 197.

10. (Jan., 1850.) The laws of Mississippi direct that, where the insolvency of the estate of a deceased person shall be reported to the Orphans' Court, that court shall order a sale of the property, and distribute the proceeds thereof amongst the creditors *pro rata*, and that in the mean time no execution shall issue upon a judgment obtained against such insolvent estate.

A judgment obtained against the administrator *before* the declaration by the Orphans' Court of the insolvency of the estate is not upon that account entitled to a preference, but must share in the general distribution. *Williams v. Benedict*, 8 How. 107.

11. But this court expresses no opinion as to the right of state legislation to compel foreign creditors in *all* cases to seek their remedy against decedents in the state courts alone, to the exclusion of the jurisdiction of the courts of the United States. *Ib.*

12. (Dec., 1850.) The Constitution of the United States has recognized the distinction between law and equity, and it must be observed in the federal courts, although there is no distinction between them by the laws of Texas. *Bennett v. Butterworth*, 11 How. 669.

13. (Dec., 1855.) By the general rules of commercial law, the payee or indorsee of a bill, upon its presentment, and upon refusal by the drawee to accept, has the right to immediate recourse against the drawer. He is not bound to wait to see whether or not the bill will be paid at maturity. *Watson v. Tarpley*, 18 How. 517.

14. A statute of a state, which forbids a suit from being brought in such a case until after the maturity of the bill, can have no effect upon suits brought in the courts of the United States. So, also, if the statute seeks to make the right of recovery, in a suit brought in case of non-acceptance, dependent upon

proof of subsequent presentment, protest, and notice for non-payment. *Ib.*

15. The decisions of this court upon these points examined. *Ib.*

16. (Dec., 1858.) The practice of allowing ejectments to be maintained in state courts, upon equitable titles, cannot affect the jurisdiction of the courts of the United States. *Fenn v. Holme*, 21 How. 481.

17. (Dec., 1862.) The statutory enactments of the states of the Union in respect to evidence, in cases at common law, are obligatory upon the judges of the courts of the United States, who are bound to apply them as rules of decision. *Wright v. Bales*, 2 Black, 535.

18. (Dec., 1867.) Though state legislatures may abolish in state courts the distinction between actions at law and actions in equity, by enacting that there shall be but one form of action, which shall be called "a civil action," yet the distinction between the two sorts of proceedings cannot be thereby obliterated in the federal courts. *Thompson v. Railroad Companies*, 6 Wall. 134.

19. (Oct., 1878.) The jurisdiction of the federal courts cannot be affected by state legislation; and they will enforce equitable rights created by such legislation, if they have jurisdiction of the subject-matter and the parties. *Smith v. Railroad Co.*, 9 Otto, 398.

20. (Oct., 1879.) *Railroad Company v. Tennessee* (*supra*, p. 337) cited and approved. *Railroad Co. v. Alabama*, 11 Otto, 832.

21. Where the statute of Alabama, subjecting her to suit in her courts, was in force at the time when a contract with her was made and a suit thereon brought, but their functions were essentially those of a board of audit, and the plaintiff had no means of enforcing the payment of a judgment or a decree in his favor, — *Held*, that the repeal of the statute deprives the court of jurisdiction to proceed, and is not in violation of the contract clause of the Constitution of the United States. *Ib.*

22. (Oct., 1864.) The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, are to be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. *Loring v. Marsh*, 2 Cliff. 311.

23. In cases depending upon the statute of a state, especially in those respecting the titles to land, the federal courts will adopt the construction of the state courts, when that construction is settled or can be ascertained. *Ib.*

24. The same rule prevails in equity as at law. *Ib.*

25. The natural import of the words in the Judiciary Act includes the laws in relation to evidence, as well as the laws in relation to property. *Ib.*

26. The construction given to a state statute of the description mentioned, by the state court, is regarded as a part of the statute, and is as obligatory on the courts of the United States as the text; and if the state court adopts new views as to the construction of such a statute, the federal courts will follow the latest settled adjudication. *Ib.*

27. The decisions of the state courts, however, cannot be allowed to retroact upon the judgments of the federal courts. *Ib.*

28. (Nov., 1854.) State statutes are rules of decision in the courts of the United States, when they prescribe a law governing the right or title in litigation, but are not allowed to interfere with the processes or modes of procedure of the tribunals of the United States. *New England Screw Co. v. Bliven*, 3 Blatchf. 240.

29. (Feb., 1859.) Under the thirty-fourth section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 92), which provides that "the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," the law of a state allowing a party to a suit to be examined as a witness on his own behalf is a rule of decision to guide the judgment, and not a rule of practice, and must be adopted as a rule in this court. *Dibblee v. Furniss*, 4 Blatchf. 262.

30. (Oct., 1863.) The equity powers of the courts of the United States cannot be abridged by state legislation. *Parsons v. Lyman*, 5 Blatchf. 170.

31. (Aug., 1869.) In an action at law, this court [sitting in Connecticut] is governed by the laws in force in Connecticut, when those laws relate to the substantial rights of the parties, and not to mere matters of practice. *Curtis v. Smith*, 6 Blatchf. 537.

32. (Jan., 1876.) Under sec. 967 of the Revised Statutes of

the United States, which provides that "judgments and decrees rendered in a Circuit or District Court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease by law to be liens thereon," the courts of the United States, in the State of New York, are not vested with the discretionary power which the state courts of New York have, under sec. 282 of the Code of Procedure of New York, to order real property bound by a lien of a judgment to be exempted from such lien in certain cases during the pendency of an appeal from such judgment. *Myers v. Tyson*, 13 Blatchf. 242.

33. (Sept., 1858.) No state of the Federal Union, by declaring in a grant which it makes of certain rights, that any question which arises under that grant shall be determined in such or such a way, can prevent any class of citizens from suing in the federal courts, if, by the Constitution and statutes of the United States, they have a right to sue in such courts. *Mason v. The Boom Company*, 3 Wall. Jr. 252.

34. (May, 1869.) The courts of the United States are not constituted guardians of the public peace under state laws. These matters are left absolutely to the state courts. *Woodson v. Fleck*, Chase, 305.

35. (Aug., 1870.) A judge of a United States court has no power or jurisdiction to authorize the arrest of a citizen for any breach of the peace or violation of the laws of a state. *In re Bergen*, 2 Hughes, 513.

36. (Sept., 1877.) Though the law of a state has provided for relief at law in the state courts, which equity alone could previously have given as between citizens of the state, this does not affect the equitable jurisdiction of the United States courts to grant the equitable relief. *Breeden v. Lee*, 2 Hughes, 484.

37. (Nov., 1871.) The fact that a state statute has provided a remedy at law against a fraudulent judgment does not preclude the judgment debtor from a resort to the equity courts of the United States for relief against it. *Noyes v. Willard*, 1 Woods, 187.

38. (March, 1873.) The "claim law" of Georgia, so far as the same applies to real estate, provides for equitable relief. It is, therefore, a remedy which cannot be administered in the federal courts, and is not prescribed to be used therein by the act of Congress approved June 1, 1872, entitled "An Act to further

the administration of justice " (17 Stat. 197). *Hall v. Mining Co.*, 1 Woods, 544.

39. In Georgia, when the United States marshal levies an execution against A., upon the real estate of B., and threatens to sell the same, B. must file his bill in equity to stop the sale, and cannot resort to the "claim law" of the state for relief. *Ib.*

40. (Nov., 1874.) Authority given by a public act of the General Assembly to a county to subscribe stock to a railroad company, and issue bonds to pay for the same, need not be pleaded. The courts of the United States will take judicial notice of the public acts of the states within which they sit. *Smith v. Tallapoosa County*, 2 Woods, 574.

41. (Nov., 1877.) The act of the legislature of Louisiana abolished the writ of *fiery facias* for the enforcement of judgments against the city of New Orleans, and declared that the effect of the judgment should be limited to fixing the amount of the plaintiff's demand, and that said judgment should be registered and paid out of any money in the city treasury designated for its payment, and, if none were designated, that the city council might, if they deemed it proper, make an appropriation for its payment.

Said act is not made obligatory upon the courts of the United States by sec. 916 of the Revised Statutes. *City of New Orleans v. Morris*, 3 Woods, 115.

42. (June, 1878.) Under the statute law of Texas it is not necessary, in an action of trespass to try title, to prove an actual trespass by defendant, except in cases where there is no controversy about the title, but only as to boundaries, and where the plaintiff having the superior title charges the defendant with trespassing on his land. *Viesca v. Wyche*, 3 Woods, 336.

43. (Nov., 1861.) The state laws constitute rules of decision to the courts of the United States when sitting as courts of law in civil matters; but this rule does not apply to a Circuit Court of the United States when sitting as a court of chancery. It is governed by the general principles of equity in the exercise of its equitable powers. *Burt v. Keyes*, 1 Flipp. 61.

44. (Feb., 1868.) The courts of the United States take cognizance of cases to enforce remedies given by a state statute, where the plaintiff who sues is a citizen of another state. *Goshorn v. Alexander*, 2 Bond, 158.

45. (Oct., 1841.) The Circuit Courts of the United States derive their jurisdiction, as well in chancery as at law, from the Constitution and laws of the Union. *Lorman v. Clarke*, 2 McLean, 568.

46. A state cannot enlarge or restrict the jurisdiction of the courts of the United States. In those states where no courts having chancery powers exist, the chancery powers of the Circuit Courts are the same as in the other states. But the contract or right is governed by the local law where it originated and was to be performed. *Ib.*

47. The local law constitutes the law of the contract, and will be enforced by the courts of the United States. It does not give capacity to these courts to exercise jurisdiction, but fixes the rights of the litigant parties. *Ib.*

48. (June, 1853.) The courts of the United States can take jurisdiction, where property has been fraudulently conveyed to defeat creditors, and proceed under a state statute, where a judgment has been obtained, and execution has been returned no property. *Wilkinson v. Yale*, 6 McLean, 16.

49. (1870.) State statutes of limitations, where Congress has not otherwise specially provided, form rules of decision in the national courts, which will give to them the same effect that they have or are entitled to in the courts of the state enacting them. *Brown v. Hiatt*, 1 Dill. 373.

50. (1873.) State legislation cannot affect the jurisdiction of this court; and a person who has the right, under the Judiciary Act, to sue in this court, cannot be compelled by an act of the state legislature, first to obtain leave of a state court. *Phelps v. O'Brien County*, 2 Dill. 518.

51. Upon this principle, a provision of the state statutes requiring leave of court to enable a party to sue upon a judgment rendered in any court of the state, is not applicable to the Circuit Court of the United States. *Ib.*

52. (1879.) The jurisdiction of the federal courts is derived from the Constitution and laws of the United States, and the same cannot be enlarged, diminished, or affected by state laws. Such jurisdiction over controversies cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts or which regulate the distribution of their judicial power. *National Bank v. Sebastian County*, 5 Dill. 414.

State Court Practice.

1. (Feb., 1825.) Congress has, by the Constitution, exclusive authority to regulate the proceedings in the courts of the United States; and the states have no authority to control those proceedings, except so far as the state process acts are adopted by Congress, or by the courts of the United States, under the authority of Congress. *Wayman v. Southard*, 10 Wheat. 1.

2. The proceedings, on executions and other process in the courts of the United States, in suits at common law, are to be the same in each state, respectively, as were used in the Supreme Court of the state in September, 1789, subject to such alterations and additions as the said courts of the United States may make, or as the Supreme Court of the United States shall prescribe by rule to the other courts. *Ib.*

3. A state law regulating executions enacted subsequent to September, 1789, is not applicable to executions issuing on judgments rendered by the courts of the United States, unless expressly adopted by the regulations and rules of those courts. *Ib.*

4. The thirty-fourth section of the Judiciary Act of 1789, ch. 20, which provides "that the laws of the several states, except," &c., "shall be regarded as *rules of decision* in trials at common law, in the courts of the United States, in cases where they apply," does not apply to the process and practice of the courts. It is a mere legislative recognition of the principles of universal jurisprudence, as to the operation of the *lex loci*. *Ib.*

5. The statutes of Kentucky concerning executions, which require the plaintiff to indorse on the execution that bank-notes of the Bank of Kentucky, or notes of the Bank of the Commonwealth of Kentucky, will be received in payment, and, on refusal, authorize the defendant to give a replevin bond for the debt, payable in two years, are not applicable to executions issuing on judgments rendered by the courts of the United States. *Ib.*

6. The case of *Palmer v. Allen* (7 Cranch, 550) reviewed and reconciled with the present decision. *Ib.*

7. (Jan., 1828.) The State of Ohio, not having been admitted into the Union until 1802, the act of Congress passed May 8, 1792, which is expressly confined in its operations to the day of its passage, in adopting the practice of the state courts into the courts of the United States, could have no operation in that state; but the

District Court of the United States, established in that state in 1803, was vested with all the powers and jurisdiction of the District Court of Kentucky, which exercised full Circuit Court jurisdiction, with power to create a practice for its own government. The District Court of Ohio did not create a system for itself, but finding one established in the state, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state courts, and by a single rule adopted the state system of practice. When, in 1807, the Seventh Circuit was established, the judge assigned to that circuit found the practice of the state adopted, in fact, into the Circuit Court of the United States; and the same has since, so far as it was found practicable and convenient, by a uniform understanding, been pursued without any positive rule upon the subject. *Fullerton v. Bank of United States*, 1 Pet. 604.

8. Although the act of the legislature of Ohio regulating the mode of proceeding in actions on promissory notes was passed after the making of the note upon which this action was brought, yet the Circuit Court of the United States for the District of Ohio, having incorporated the action under the statute, with all its incidents, into its course of practice, and having full power by law to adopt it, there does not appear any legal objection to its doing so, in the prosecution of the system under which it has always acted. *Ib.*

9. The act of 18th February, 1820, relative to proceedings against parties to promissory notes, was a very wise and benevolent law, and its salutary effects produced its immediate adoption into the practice of the courts of the United States; and the suits have, in many instances, been prosecuted under it. *Ib.*

10. It will not be contended that the practice of a court can only be sustained by written rules, nor that a party pursuing a form or mode of proceeding, sanctioned by the most solemn acts of the court through the course of years, is to be surprised and turned out of court, upon a ground which has no bearing upon the merits. Written rules are, unquestionably, to be preferred, because of their certainty; but there can be no want of certainty where long acquiescence has established it to be the law of the court, that the state practice shall be their practice, as far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making. *Ib.*

11. (Jan., 1842.) If any particular practice has prevailed in the state courts as to the manner of entering upon the record the finding of the jury, it is a mere matter of practice as to the form of taking and entering the verdict of the jury, and cannot be binding upon the courts of the United States. *Long v. Palmer*, 16 Pet. 65.

12. (Jan., 1842.) So far as the acts of Congress have adopted the forms of process and modes of proceeding and pleadings in the state courts, or have authorized the courts thereof to adopt them, and they have actually adopted them, they are obligatory, and no farther. But no court of the United States is authorized to adopt by rule any provisions of state laws which are repugnant to or incompatible with the positive enactments of Congress, upon the jurisdiction or practice or proceedings of such courts. *Keary v. Farmers' & Merchants' Bank*, 16 Pet. 89.

13. (Jan., 1844.) Where the Circuit Court, by a rule, adopts the process pointed out by a state law, there must be no essential variance between them. Such a variance is a new rule, unknown to any act of Congress or the state law professedly adopted. *McCracken v. Hayward*, 2 How. 608.

14. (Dec., 1850.) The act of Congress passed in May, 1828 (4 Stat. at Large, 278), directs that the forms and modes of proceeding in the courts of the United States, in suits at common law, in the states admitted into the Union since 1789, shall be the same with those of the highest court of original jurisdiction in the state. *Sears v. Eastburn*, 10 How. 187.

15. Therefore, where the State of Alabama passed an act to abolish fictitious proceedings in ejectments, and to substitute in their place the action of trespass, for the purpose of trying the title to lands and recovering their possession, the Circuit Court of the United States should have conformed, in its mode of proceeding, to the law of the state. *Ib.*

16. And the judgment of the Circuit Court, dismissing an action of trespass so brought, upon the ground that the law of the state was not in force in the Circuit Court, was erroneous. *Ib.*

17. (Dec., 1868.) A court of the United States has power to adopt, in a particular case, a rule of practice under a state statute; and where a Circuit Court is possessed of a case from another circuit, under the act of Feb. 28, 1839 (5 Stat. at Large, 322, s. 8), it may adopt the practice of the state in which the Cir-

cuit Court from which the case is transferred comes, as fully as could the Circuit Court which had possession of the case originally. *Supervisors v. Rogers*, 7 Wall. 175.

18. (Dec., 1869.) A state law prescribing rules of practice has no efficacy in the courts of the United States, unless those courts adopt it. *The Mayor v. Lord*, 9 Wall. 409.

19. (Oct., 1875.) The Practice Act of Illinois provides that the court shall instruct the jury only as to the law; and that the jury shall, on their retirement, take the written instructions of the court, and return them with their verdict. In this case, the court below, while it commented upon the evidence, but without withdrawing from the jury the determination of the facts, refused to allow the jury to take to their room the written instructions given them. *Held*, that the act of Congress of June 1, 1872, s. 5 (17 Stat. 197), has no application to the case, and that there was no error in the action of the court below. *Nudd v. Burrows*, 1 Otto, 427.

20. (Oct., 1876.) Under the Code of Practice of Arkansas, in force when this judgment was rendered, and therefore furnishing a rule of practice for the courts of the United States in that state, an action on a contract, upon which two or more persons were jointly bound, might be brought against all or any of them; and, although they were all summoned, judgment might be rendered against any of them severally, where the plaintiff would have been entitled to a judgment against such defendants, if the action had been against them alone. *Sawin v. Kenny*, 3 Otto, 289.

21. (Oct., 1876.) A motion for a new trial is not a mere matter of proceeding or practice in the District and Circuit Courts. It is, therefore, not within the act of June 1, 1872, and cannot be affected by any state law upon the subject. *Indianapolis & St. Louis Railroad Co. v. Horst*, 3 Otto, 291.

22. The construction given in *Nudd et al. v. Burrows, Assignee* (91 U. S. 426), to the act of June 1, 1872 (17 Stat. 197), reaffirmed. *Ib.*

23. (Nov., 1864.) State regulations, to the extent that they define the rules of property, are regarded as furnishing the rule of decision; but they do not control or affect the process or practice of the federal courts. *Goodyear v. Providence Rubber Co.*, 2 Cliff. 351.

24. (April, 1825.) The common-law practice of the state courts is not considered as the practice of the Circuit Courts, except as it existed at the passage of the act of 1789, and so far as it has since been adopted by rule. *Brewster v. Gelston*, 1 Paine, 426.

25. Although the law of the state requiring the Supreme Court to decide on a bill of exceptions, before a writ of error is brought, does not govern the practice of this court, yet a bill of exceptions was received as a substitute for a case, on a motion for a new trial. *Ib.*

26. (Sept., 1825.) There is no practice in this court of service of papers upon the agent of an attorney, as in the Supreme Court of the state [New York]. *Smith v. Jackson*, 1 Paine, 486.

27. (April, 1835.) This court, under the power given by the seventeenth section of the Judiciary Act of 1789, and the seventh section of the act of 1792, has authority to make rules relative to the signing, filing, and docketing of judgments. Such matters relate to the practice of the court, which the court may regulate according to its own pleasure, provided it be not repugnant to the laws of the United States. Nor has it ever been understood that such practice could be shown only by written rules. If it has existed for a series of years, it is to be presumed that it has been established under the order of the court. *Koning v. Bayard*, 2 Paine, 251.

28. A regular docket of all judgments in this court having been kept for a period of more than thirty years, in the manner required by the act [of New York] of 1787, to be kept by the clerks of the state courts, such unbroken practice is sufficient to warrant the conclusion that it was adopted by order of the court. *Ib.*

29. By the Process Act of Congress of 1789 it is declared that, until further provision is made, and except where by that act, or other statutes of the United States, it was otherwise provided, *the forms of writs and executions*, except their style, and *the modes of process*, in the Circuit and District Courts, in suits at common law, should be the same in each state respectively, as were then used or allowed in the Supreme Courts of the same. The act of 1792 contains substantially the same directions. *Ib.*

30. The expression "*modes of process*," used in these acts, indicate the progressive course of the business in a cause, from

its commencement to its termination, and applies to proceedings which take place after judgment, as well as before, down to the satisfaction of the judgment, including the conduct of the officer in the execution of the process; and this is to conform to the law of the state as it existed in September, 1789. By these acts Congress adopted both the *form* and *effect* of execution, as established by the state laws in 1789. *Ib.*

31. Therefore, the lien created by judgments, in the Circuit Courts of the United States, upon land and the mode of proceeding to obtain satisfaction of the judgments, are regulated by the state laws. *Ib.*

32. (June, 1851.) It is a well-settled principle, in the jurisprudence of the United States, that the rules of state practice acted upon by the courts of the United States, in a state, as obligatory upon them, have the efficacy of rules adopted by express order of those courts. *Per* BETTS, J. *United States v. Douglass*, 2 Blatchf. 208.

33. (Oct., 1872.) The effect of the fifth section of the act of June 1, 1872 (17 Stat. at Large, 197), which provides that the practice, pleadings, and forms and modes of proceeding, in other than equity and admiralty causes in the Circuit and District Courts of the United States shall conform, as nearly as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, is not to authorize the commencement of an action at law in the Circuit Court by a summons issued in the name of the plaintiff's attorney, according to the mode of commencing actions in the courts of the State of New York. *Martin v. Criscuola*, 10 Blatchf. 211.

34. (Dec., 1875.) Under sec. 914 of the Revised Statutes of the United States, a pleading in a suit at law in this court, which is not authorized in a like suit in a court of this state, will be set aside on motion. *Lewis v. Gould*, 13 Blatchf. 216.

35. The common-law forms of pleading are no longer necessary in the United States courts within the State of New York, nor are they admissible, except as they may be deemed to be substantially a compliance with the requirements of the code of procedure of the state, as to pleadings. *Ib.*

36. (Feb., 1877.) In an action of tort, in a court of the United States, where the defendant suffers a default, the plaintiff has no

constitutional right to have the damages assessed by a jury. *Raymond v. Danbury & Norwalk Railroad Co.*, 14 Blatchf. 133.

37. Such assessment is a matter of practice, and may be made according to the practice of the courts of the state in which the federal court is held. *Ib.*

38. In Connecticut, such assessment may be made by the court. *Ib.*

39. (April, 1879.) What is a sufficient conformity in practice in this court to the practice of the courts of the state, in respect to the review of a trial before a referee. *Robinson v. Mutual Benefit Life Ins. Co.*, 16 Blatchf. 195.

40. (April, 1803.) At an early period after the organization of the federal courts, the rules of practice in force in the state courts, which were similar to the English practice, were adopted by the judges of the Circuit Court. A subsequent change in the practice of the state courts will not authorize a departure from the rules so adopted in the Circuit Court. *Anonymous*, Pet. C. C. 1.

41. (April, 1816.) Practice and proceedings under the laws of Pennsylvania, to sell the lands of a deceased person for the payment of debts. *Wilson v. Watson*, Pet. C. C. 269.

42. Practice and proceedings under the laws of England, where lands are taken in execution for the payment of debts. *Ib.*

43. (April, 1818.) The practice in the courts of Pennsylvania, for the jury to find a special verdict, in a cause where the parties have not legal but have equitable claims, does not apply in the Circuit Court of the United States, that court having equity powers. *Conn v. Penn*, Pet. C. C. 497.

44. (Oct., 1824.) The rule of the Supreme Court of New Jersey, made in 1805, that after a cause has slept on the docket for twelve months, a term's notice of trial must be given, never having been adopted by this court, is not obligatory on the practice here. *Den v. Mandeville*, 4 Wash. 445.

45. (June, 1869.) The practice of the state courts in relation to summoning juries, whether statutory or otherwise, does not become the practice of the United States courts until expressly adopted by the latter. *Alston v. Manning*, Chase, 460.

46. A jury was summoned according to what had for a long time been the practice of the courts, and the statutory requirements of the State of South Carolina. But before the summoning

of the jury, those statutory requirements and the practice of the state courts had been materially modified. The jury is properly summoned. *Ib.*

47. (May, 1877.) A rule of practice prescribed by a court of justice is for the government of suitors, counsel, and officers of the court in the conduct of causes and proceedings; and though it controls these persons, it does not control the discretion of the court itself so as to deprive it of power to secure the trial of causes on their merits, on proper showing. *Mutual Building Fund v. Bossieux*, 1 Hughes, 386.

48. An act of the legislature which takes away this discretion from a court, and deprives it of this power, is more than a rule of practice, and affects the common-law right of suitors to sue in the courts. *Ib.*

49. Sec. 914 of the Revised Statutes of the United States, requiring the United States courts to conform their practice, as near as may be, to the practice obtaining in the courts of the several states in which they are held, contemplates only those rules of practice which are merely such, and does not contemplate those enactments of state legislation relating to practice in the courts, which deprive them of power to control the application of rules of practice according to their discretion. *Ib.*

50. The discretionary power of United States courts held in Virginia, over proceedings at rules, is not limited by secs. 2 and 52 of the one hundred and sixty-seventh chapter of the Code of Virginia of 1873, pp. 1089 and 1097. *Ib.*

51. (April, 1873.) The act of Congress of July 20, 1840 (5 Stat. 394), prescribing how jurors in courts of the United States shall be designated, does not require a minute adherence to the state practice on that subject by the United States courts. *United States v. Collins*, 1 Woods, 499.

52. It is not necessary, under said act, for the United States courts to employ state officers to perform for them any part of the duty of designating jurors. They may and should impose that duty entirely on their own officers. *Ib.*

53. (Nov., 1874.) When the personal property of such an institution [a seminary of learning, which is a public corporation, under the control of officers appointed by the state] is levied upon, it is not necessary to file a bill in equity to restrain the sale. It may be done in Louisiana by intervention and

third opposition. *Featherman v. The Louisiana State Seminary*, 2 Woods, 71.

54. (June, 1859.) The Circuit Court of the United States within the Southern District of Ohio has adopted, as a rule of practice, the proceedings in aid of execution provided for by the Code of Ohio. *Gregory v. Hewson & Holmes*, 1 Bond, 277.

55. (June, 1851.) A law of the state, regulating the practice of the state courts, does not apply to the courts of the United States unless adopted by act of Congress, or by the courts of the United States. *Yaw v. Mead*, 5 McLean, 272.

56. (Nov., 1872.) The act of June 1, 1872, abrogated all rules of this court inconsistent with the state practice in common-law cases, and required the United States Circuit and District Courts to conform to such practice in all cases where practicable. *Republican Ins. Co. v. Williams*, 3 Biss. 370.

57. No discretion is left except as to how near it is possible to follow the state practice. *Ib.*

58. Congress intended to remove the double system of practice, pleading, and proceedings, and establish a uniform system which members of the bar could follow in either court. *Ib.*

59. The regularity of proceedings should be decided by the state laws and the decisions of the state courts. *Ib.*

60. (Jan., 1877.) In cases where Congress has pointed out a course of procedure, or has legislated generally upon the subject-matter embraced or involved in the proceeding sought to be pursued, such legislation should be followed, although opposed to the forms and mode of proceeding prevailing in the state courts and established by state statutes. *Easton v. Hodges*, 7 Biss. 324.

61. (1875.) Since the act of Congress of June 1, 1872 (17 Stat. 197, s. 5), the provisions of the state statutes as to pleading and practice in purely legal actions are in the main applicable to such actions in the Circuit Court of the United States. *Weed Sewing-Machine Co. v. Wicks*, 3 Dill. 261.

62. Where the state law directs or authorizes all suits to be brought in the name of the real party in interest, this will, in the absence of some special statute of Congress, give the like party the right to sue in actions at law in the federal courts sitting in such state. *Ib.*

63. (July, 1855.) The Circuit Court has by rule adopted the forms of pleadings and practice in the courts of this state [Cal-

fornia], as ascertained by its Practice Act, unless they contravene the acts of Congress or the rules of this court. *Teese v. Phelps, McAll.* 17.

Subpœna Duces Tecum.

1. (May, 1879.) The major-general commanding the Department of the East, in the army of the United States, was served with a *subpœna duces tecum* in this suit, requiring him to produce in court official papers on file in the office of the headquarters of such department. A motion was made that such subpœna be set aside. It appearing that copies of such papers could be read in evidence, and it not appearing that the originals would serve a different purpose from the copies, or that the copies could not be procured, — *Held*, that the motion must be granted. *Corbett v. Gibson*, 16 Blatchf. 334.

2. (June, 1880.) A *subpœna duces tecum* cannot issue to a witness not a party to a suit, to compel him to bring before the court patterns for a stove. *In re Elizabeth M. Shepard*, 18 Blatchf. 225.

3. (1876.) Practice of the court in respect to the issue and form of *subpœnas duces tecum* stated. *United States v. Babcock*, 3 Dill. 566.

Supersedeas.

1. (Nov., 1867.) Where a judgment is for a large amount, it is discretionary with the court to approve of a bond intended to operate as a stay, with a penalty less than double such amount, having regard to the security and its sufficiency for the amount embraced in the condition of the bond. *Hatch v. Coddington*, 5 Blatchf. 523.

2. In this case, the usual affidavit of the ability of the sureties accompanied the bond at the time of its approval, and, there being no allegation of their inability, the court held the bond to be regular, and did not require any further justification, although the sureties had not justified in compliance with a notice from the defendant in error requiring them to do so. *Id.*

3. Where, after a trial in an action at law, a motion is made for a new trial, and the motion is denied by an opinion of the court filed in the clerk's office, and a judgment is then entered,

the ten days within which a writ of error must be sued out, to be a *supersedeas* and stay of execution, does not commence to run from such filing of such opinion, but from the entry in the clerk's office of the rule for judgment. *Ib.*

4. (March, 1880.) A writ of error will operate as a *supersedeas*, under sec. 1007 of the Revised Statutes, if duly served "within sixty days, Sundays exclusive," after a motion for a new trial has been overruled. *Rutherford v. Penn Mutual Life Ins. Co.*, 1 McCrary, 120.

Transfer of Causes.

1. (Dec., 1868.) The act of Feb. 28, 1839, s. 8 (5 Stat. at Large, 322), providing for the transfer, under certain circumstances named in it, of a suit from one Circuit Court to the most convenient Circuit Court in the next adjacent state, is not repealed by the act of March 3, 1863 (12 Stat. at Large, 768), providing that under certain circumstances named in it, the circuit judge of one circuit may request the judge of any other circuit to hold the court of the former judge during a specified time. *Supervisors v. Rogers*, 7 Wall. 175.

2. (Nov., 1812.) Under the act of March 2, 1809, ch. 94, if the disability of the district judge terminates in his death, the Circuit Court must remand the certified causes to the District Court. *Ex parte United States*, 1 Gall. 338.

Waiver by Appearance.

1. (Feb., 1808.) The appearance of the defendants to a foreign attachment in a Circuit Court of the United States waives all objection to the non-service of process. *Pollard v. Dwight*, 4 Cranch, 421.

2. (Oct., 1873.) And if the parties do not except to such order [referring the case to a master for an account], but appear under it, before the master and take, both of them, testimony upon the subjects of reference, for as long a term as they desire, and then, announcing that they do not desire to take further evidence, submit the matters of reference for the determination of the master (taking no exception before him), it is no ground of error (the Circuit Court having passed upon his

report, and, with some modifications, confirmed it), that before the cause was ready for a decree, and without settling the rights of the parties, the court referred it to the master for an account, and that the master took and stated an account in accordance with the terms of the order. *City of Memphis v. Brown*, 20 Wall. 291.

3. (Oct., 1878.) Illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside; nor after such motion is denied, by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits. *Harkness v. Hyde*, 8 Otto, 476.

Waiver of Irregularity in a Writ.

1. (June, 1842.) A writ by virtue of which a bail bond was taken will not be set aside on motion, after judgment in the original action and suit on the bond. *Hall v. Singer*, 3 McLean, 17.

2. Errors in the original suit should have been corrected as they occurred, or by writ of error. *Ib.*

3. It is too late to correct such errors by plea, or after action brought on the bail bond. *Ib.*

Waiver of Exception to Jurisdiction.

1. (Feb., 1810.) It is too late to question the jurisdiction of the Circuit Court after the cause has been sent back by mandate. *Skillern v. May*, 6 Cranch, 267.

2. (Jan., 1828.) On a trial upon the merits, it is too late to take exception to the capacity of the plaintiff to sue. This should have been done by a plea in abatement before trial, and the omission to do this is a waiver of the objection. *Conard v. Atlantic Ins. Co.*, 1 Pet. 387.

3. (Dec., 1852.) A claim by the trustee, in reconvention, was not a waiver of the exception to the jurisdiction. *Peale v. Phipps*, 14 How. 368.

4. (Dec., 1870.) Appearing by counsel and moving to dismiss the bill for want of jurisdiction, and also for want of equity, is a

waiver of a non-resident's privilege, and amounts to a voluntary appearance. *Jones v. Andrews*, 10 Wall. 327.

Waiver in Pleading.

1. (Jan., 1845.) There was a judgment against an administrator of assets *quando acciderint*.

Upon this judgment a *scire facias* was issued, containing an averment that goods, chattels, and assets had come to the hands of the defendant.

Upon this *scire facias* there was a judgment by default. Execution was issued, and returned "*nulla bona*."

A *scire facias* was then accorded against the administrator, to show cause why the plaintiffs should not have execution "*de bonis propriis*."

It was then too late to plead that the averment in the first *scire facias* did not state that assets had come into the hands of the administrator subsequent to the judgment *quando*. *Dickson v. Wilkinson*, 3 How. 57.

2. If a party fail to plead matter in bar to the original action, and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment, nor in a *scire facias*. *Ib*.

3. (Jan., 1848.) If a plea to the jurisdiction and a plea of *non assumpsit* be put in, and the issue be made upon the latter plea only, no notice being taken of the former, and upon this state of the pleadings the cause goes on to trial, the plea to the jurisdiction is considered as waived. *Bailey v. Dozier*, 6 How. 23.

4. (Dec., 1850.) Where the writ, pleadings, and contract spoke only of Frederic D. Conrad, and the judgment went against Daniel Frederic Conrad, the defendant, it was too late, after verdict and judgment, to assign the variation as error. *Conrad v. Griffey*, 11 How. 480.

5. (Dec., 1851.) The refusal or omission to join in demurrer was a waiver of the plea demurred to. *Morsell v. Hall*, 13 How. 212.

6. (Dec., 1853.) Where the assignors of a patent-right were joined with the assignee for a particular locality, in a bill for an injunction to restrain a defendant from the use of the machine patented, and the defendant raised in this court, and after a final

decree, an objection arising from a misjoinder of parties, the objection comes too late. *Livingston v. Woodworth*, 15 How. 546.

7. (Dec., 1867.) An objection of variance between allegation and proof must be taken when the evidence is offered. It cannot be taken advantage of after it is closed. *Roberts v. Graham*, 6 Wall. 578.

8. (Dec., 1868.) In a case having long and complicated pleadings, where a second count of a declaration has been left, by the withdrawal of a plea, without an answer, so that judgment might have been had on it by *nil dicit*, a Superior Court will not, on error, infer, as of necessity, that a judgment below for the plaintiff was thus given; the case being one where, after such withdrawal, there were numerous demurrers, pleas, replications, and rejoinder, arising from a first count, and the proceedings showing that these were the subject of controversy. The second count will be taken to be waived. *Aurora City v. West*, 7 Wall. 82.

9. (Dec., 1869.) Pleading over, without reservation, to a declaration adjudged good on demurrer, is a waiver of the demurrer. *Watkins v. United States*, 9 Wall. 759.

10. (Dec., 1870.) The filing of a plea to the merits after a demurrer is overruled, operates as a waiver of the demurrer. *Campbell v. Wilcox*, 10 Wall. 421.

11. (Oct., 1874.) Though, as a general rule, suits for the infringement of a patent are defeated by the surrender of the patent, and a new original bill—not a supplemental bill—is the proper sort of bill by which to proceed for an infringement under the reissue, yet where there has been a surrender and reissue, and the patentee has proceeded by a supplemental bill, the defendant making no objection to this sort of proceeding, but allowing proofs to be taken and the suit to proceed otherwise to a conclusion, as if the irregularity were wholly unimportant, the two parties proceeding respectively throughout the trial upon the assumption and concession that the reissued patent was substantially for the same invention as that embodied in the original patent,—all objection to the irregularity in proceeding by a supplemental bill, instead of by a new original one, must be considered as waived. *Reedy v. Scott*, 23 Wall. 352.

12. (Oct., 1876.) An objection that leave was not given to file the bill of foreclosure,—the mortgaged premises being at the time in the possession of a receiver appointed in a former

suit in the same court, — if, under any circumstances, available, will not be sustained, if made a year and a half after the bill was filed, and when the party objecting had in the mean time appeared, answered it, and cross-examined the witnesses of the complainant. *Jerome v. McCarter*, 4 Otto, 734.

Waiver. Jury.

1. (Jan., 1847.) Where the laws permit a waiver of a trial by jury, it is too late to raise an objection that the waiver was not made a matter of record after the case has proceeded to a hearing. *Phillips v. Preston*, 5 How. 278.

2. (Dec., 1871.) The effort of a defendant to secure, so far as he can, by peremptory challenges for cause, a fair trial of his case does not waive an inherent and fatal objection to the entire panel. *Clinton v. Englebrecht*, 13 Wall. 434.

3. (Dec., 1871.) Where a charge is merely ambiguous, a party dissatisfied with it ought, before the jury leave the bar, to ask the court to make it clear. He should not acquiesce in the correctness of the instruction, take his chance with a jury, and, after the verdict is against him, claim the benefit of the ambiguity on error. *Improvement Co. v. Munson*, 14 Wall. 442.

4. (Oct., 1877.) By the Code of Practice of Utah, the failure of a defendant to appear at the time of the assessment of damages against him by the court is a waiver by him of an assessment by a jury. *McAllister v. Kuhn*, 6 Otto, 87.

Waiver of Exception.

1. (Oct., 1875.) An exception is waived by going to trial on the merits. *Kittredge v. Race*, 2 Otto, 116.

Waiver. Referees.

1. (Oct., 1878.) A party who goes to trial before referees, without requiring an oath to be administered to them, waives any objection to the omission of such oath. *Newcomb v. Wood*, 7 Otto, 581.

2. The fact that an award was signed by only two of three referees was not called to the attention of the court when their

report was confirmed and judgment rendered thereon. *Held*, that it furnishes no ground for reversing the judgment. *Ib.*

Waiver. Evidence.

1. (Oct., 1874.) Where objections to the reading of a deposition, made while a trial is in progress, do not go to the testimony of the witness, but relate to defects which might have been obviated by retaking the deposition, the objections will not be sustained, no notice having been given beforehand to opposing counsel that they would be made. *Doane v. Glenn*, 21 Wall. 33.

2. Such objections, if meant to be insisted on at the trial, should be made and noted when the deposition is being taken, or be presented afterwards, by a motion to suppress it. Otherwise they will be considered as waived. *Ib.*

3. (Oct., 1878.) A party specifying his objection to the admission of evidence must be considered as waiving all others, or as conceding that there is no ground upon which they can be maintained. *Evanston v. Gunn*, 9 Otto, 660.

Waiver of Writ of Error.

1. (Jan., 1848.) A motion for a new trial waives the right to a writ of error in those circuits only where the courts have adopted a rule to this effect; and in those circuits the right should be waived upon the record before the motion for a new trial is heard. *United States v. Hodge*, 6 How. 279.

Witnesses.

1. (June, 1869.) A service of a subpoena on a witness, in a civil suit, by a private person, not the marshal or his deputy, is a proper and legal service of a subpoena issued by this court. *Cummings v. Akron Cement & Plaster Co.*, 6 Blatchf. 509.

2. A person who attends this court as a witness, on the request of a party, without the actual service of a subpoena, is entitled to his fees, and such fees may be taxed against the defeated party, under the act of Feb. 26, 1853 (10 Stat. at Large, 161). *Ib.*

3. (Jan., 1877.) In an action at law in a federal court in New York, a defendant cannot, before the trial, be examined as a wit-

ness for the plaintiff out of court, although such examination is provided for by the statute of New York, in suits in the courts of New York. *Beardsley v. Littell*, 14 Blatchf. 102.

4. The whole subject of oral testimony, in actions at common law in the courts of the United States, is regulated by the statutes of the United States. Under the provisions of those statutes, the examination of an adverse party as a witness before trial in a common-law suit cannot be had; and there is nothing in sec. 914 of the Revised Statutes of the United States which provides for the conformity of the practice of the federal courts, in common-law suits, to that of the state courts, that supersedes those provisions. *Ib.*

5. (Oct., 1855.) It is irregular for the court to instruct the witnesses generally, or even a single witness generally, that they were not bound, in answer to questions which might be put to them, to make answers which would criminate themselves. The proper way is to wait until a question is asked, which, if answered in one way, may criminate the witness, and for the court *then* to interfere. *United States v. Darnaud*, 3 Wall. Jr. 144.

6. (July, 1870.) Witness fees cannot be taxed in the federal courts unless the witness has been regularly subpœnaed. *Sawyer v. Aultman & Taylor Mfg. Co.*, 5 Biss. 165.

7. It is not sufficient that they attend at the request of the party. The act of Congress evidently contemplated some process of the court. *Ib.*

Writ. Summons.

1. (March, 1873.) A writ which requires the defendant to answer to the plaintiff in a plea of trespass, and also to a certain bill of the plaintiff against the defendant, for damages, in a sum named, for deceit and breach of promise of marriage, sets forth, in the action for deceit, an action in trespass on the case, and the rest of the *ac etiam* clause may be regarded as explanatory of the subject-matter to which the deceit was applied, or may be rejected as surplusage; and, therefore, the writ is not incongruous. *Wilkinson v. Pomeroy*, 10 Blatchf. 524.

2. (Jan., 1879.) A summons, in a common-law action, in this court, must be signed by the clerk, and be under the seal of the court. *Peaslee v. Haberstro*, 15 Blatchf. 472.

3. Sec. 911 of the Revised Statutes of the United States, which

prescribes that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof," is not inconsistent with, or repealed by, the subsequent provision in sec. 914, that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held." *Ib.*

4. (Aug., 1880.) A suit at common law, in this court, was sought to be commenced by serving on the defendant a paper purporting to be a summons, in the form prescribed by the statute of New York for commencing a civil action, signed by the plaintiff's attorney, but not under the seal of the court nor signed by the clerk of the court. The defendant moved, before appearing generally in the suit, to set aside the summons, and the plaintiff asked to be allowed to amend the summons *nunc pro tunc*, by having the seal and the signature added. *Held*, —

(1.) The summons is process, and did not conform to sec. 911 of the Revised Statutes, and was void.

(2.) The provisions of sec. 911 are not abrogated by sec. 914.

(3.) The summons could not be amended under secs. 948 and 954, because it was not process and had not been issued from the court.

(4.) The summons must be set aside. *Dwight v. Merritt*, 18 Blatchf. 305.

Writ. Capias.

1. (April, 1797.) It appears sufficient to my mind, to defeat the present motion, that the *alias* is not tested at the return of the original *capias*, nor made returnable at the next ensuing term. There is no principle or usage of law that will sanction the idea of giving a retrospective test as far back as April term, 1792, to an *alias capias* issued in August, 1796. *United States v. Parker*, 2 Dall. 378.

2. There is no effectual mode of issuing an *alias capias*, but by testing it of the term to which the original writ was returned. *Ib.*

Writ. Attachment of Property. Garnishment.

1. (April, 1798.) A foreign attachment will not lie in the Circuit Court. *Hollingsworth v. Adams*, 2 Dall. 396.

2. (Jan., 1848.) By the laws of Louisiana, debts which are due to a defendant, against whom an execution has issued, may be seized and sold. But they must first be appraised at their cash value, and if two-thirds of such appraised value is not bid, the sheriff must adjourn the sale and again advertise the property. *Collier v. Stanbrough*, 6 How. 14.

3. This mode of proceeding was adopted by a rule of the Circuit Court of the United States, and was therefore obligatory upon the marshal. *Ib.*

4. Where the marshal made a sale of some promissory notes secured by mortgage, without an appraisement, and sold them for less than one-third of their amount, the sale was void. *Ib.*

5. (Dec., 1852.) Under the attachment laws of Maryland, a share in the Baltimore Mexican Company, which had fitted out an expedition under General Mina, was not in 1827 the subject of an attachment under a judgment, whether such share was held by the garnishee, under a power of attorney to collect the proceeds, or under an equitable assignment to secure a debt. *Deacon v. Oliver*, 14 How. 610.

6. The answers of the garnishee to interrogatories filed, were literally correct. He had not in his hands any "funds, evidences of debt, stocks, certificates of stock," belonging to the debtor, nor "any acknowledgment by the Mexican government," on which an attachment could be laid. *Ib.*

7. (Oct., 1876.) In Kansas, an order of a court in a proceeding in aid of execution, directing a garnishee to pay to the judgment creditor money which he owes to the judgment debtor, is not a judgment, and does not determine finally the liability of the garnishee. *Atlantic & Pacific Railroad Co. v. Hopkins*, 4 Otto, 11.

8. Therefore, in such a proceeding, an order of the Circuit Court of the United States, sitting in that state, awarding execution against a garnishee, is erroneous. *Ib.*

9. (Oct., 1880.) An attachment cannot be sued out of the Circuit Court against the property of the defendant in an action

where the court has not acquired jurisdiction of the person. *Ex parte Railway Co.*, 13 Otto, 794.

10. This ruling is applicable to the Circuit Court of the United States sitting in Iowa, notwithstanding the act of June 4, 1880, ch. 120 (21 Stat. 155). *Ib.*

11. (May, 1813.) Property in the hands of a third person, having a lien thereon, is not attachable in a suit against the general owner; but if the depositary waive his lien, the objection does not lie in the mouth of the general owner. *Meeker v. Wilson*, 1 Gall. 419.

12. (Nov., 1822.) A judgment debtor is not liable to be attached as a garnishee under the foreign attachment act of Rhode Island. *Franklin v. Ward & Goodale*, 3 Mason, 136.

13. (Oct., 1823.) Judgment in a trustee process against the defendant, as garnishee of the plaintiff, is no defense in a suit for the debt if the plaintiff in the original trustee process has, by his neglect to comply with the local laws, put his judgment in a state of suspension, so that execution can no longer issue upon it, and it cannot be revived by a *scire facias*. *Flower v. Parker*, 3 Mason, 247.

14. (April, 1816.) A foreign attachment may be laid on property in the hands of the plaintiff in the attachment. *Graighle v. Notnagle*, Pet. C. C. 245.

15. Form of proceedings under the foreign attachment law of Pennsylvania, and an examination of the practice under the same, and of the principles by which it is regulated. *Ib.*

16. When the garnishee is plaintiff, there is no necessity for a summons, *scire facias*, interrogatories, or any coercive process against himself. *Ib.*

17. Lands are subject to foreign attachment in Pennsylvania. *Ib.*

18. Mode of proceeding where there is no garnishee, or when lands are attached. *Ib.*

19. *Quære*: Whether under the foreign attachment law of Pennsylvania it is necessary that the plaintiff who has attached the property of the defendant in his own possession should obtain a judgment, that he retain the property in satisfaction of the debt. *Ib.*

20. (Sept., 1875.) Sec. 6 of the "act to further the administration of justice" (17 Stat. 197; Rev. Stat. s. 915) does not

confer upon the United States courts jurisdiction to institute suits by the process of foreign attachment. *Chittenden & Co. v. Darden & Holston*, 2 Woods, 437.

21. The voluntary appearance of the defendant in a suit so commenced would cure the defect of jurisdiction, but service of summons made upon him *in invitum* while in the district would not. *Ib.*

22. The giving of a bond by a non-resident for the release of property seized by process of foreign attachment, issued from a United States court, is not a voluntary appearance, and does not give the court jurisdiction. *Ib.*

23. Commissioners of the Circuit Courts of the United States have not by statute any power to issue writs of attachment returnable to said courts. *Ib.*

24. (April, 1854.) Attachment of property. It is not necessary that process should be first issued, or that an attempt should be made by an officer to find the defendant. It is sufficient if he so conceal himself that an attempt to serve process would be useless. *North v. McDonald*, 1 Biss. 57.

25. (Oct., 1860.) In Wisconsin, an assignee under a fraudulent assignment may be made a garnishee in attachment proceedings; and it is immaterial how the property came into his hands, so it be property liable to seizure by attachment.

If the garnishee afterwards turns over property to a receiver appointed under a creditors' bill, filed by another creditor, the court will protect him by ordering the proceeds of such property paid to the creditors to whom he was first liable as garnishee. *Perego v. Bonesteel*, 5 Biss. 69.

26. (1879.) A plaintiff in an attachment suit in the federal court must furnish security in the same manner, as to amount and qualification and residence of the sureties, that the laws of the state require to be furnished if he were proceeding in the courts of the state (Rev. Stat. s. 915). *Singer Mfg. Co. v. Mason*, 5 Dill. 488.

27. (April, 1855.) After the institution of a suit in the Circuit Court against a defendant, a garnishment subsequently sued out against him in a state court cannot affect it nor be pleaded as a defense to the action. *Greenwood v. Rector*, Hempst. 708.

Writ of Entry.

1. (May, 1830.) A writ of entry to foreclose a mortgage may be well maintained against a tenant in possession who is only lessee at will to the mortgagor. *Fales v. Gibbs*, 5 Mason, 462.

Writ of Right.

1. (Feb., 1814.) The Circuit Courts of the United States have jurisdiction in writs of right where the property demanded exceeds \$500 in value; and if upon the trial the plaintiff recover less he is not to be allowed his costs, but at the discretion of the court may be adjudged to pay costs. *Green v. Liter*, 8 Cranch, 229.

2. (Feb., 1817.) Distinction between a writ of right *patent* and a writ of right *close*. *Liter v. Green*, 2 Wheat. 311.

3. (Feb., 1822.) In a writ of right the tenant cannot give in evidence the title of a third person with which he has no privity, unless it be for the purpose of disproving the demandant's seisin. *Green v. Watkins*, 7 Wheat. 27.

4. Therefore, where the demandant proves an actual seisin by a *pedis positio*, the tenant cannot be permitted to prove a superior outstanding title, since it does not disprove the demandant's seisin. *Ib.*

5. But where the demandant relies for proof of seisin solely upon a constructive actual seisin, in virtue of a patent from the state, of vacant lands, the tenant may show that the land has been previously granted by the state, for that divests the title of the state and disproves the demandant's constructive seisin. *Ib.*

6. A writ of right brings into controversy only the titles of the parties to the suit; and either party may therefore prove any fact which defeats the title of the other, or shows it never had a legal existence, or has been parted with. *Ib.*

7. The case of *Green v. Liter* (8 Cranch, 229) commented on and explained. *Ib.*

8. (Jan., 1830.) In a writ of right the tenant may, on the mise joined, set up a title out of himself and in a third person. If anything which fell from the court in the case of *Greene v. Liter* (8 Cranch, 229) can be supposed to give countenance to the opposite doctrine, it is done away by the explanation given by the court in *Greene v. Watkins*, 7 Wheat. 31. It is there laid

down that the tenant may give in evidence the title in a third person, for the purpose of disproving the demandant's seisin; that a writ of right does bring into controversy the mere right of the parties to the suit; and, if so, it by consequence authorizes either party to establish by evidence that the other has no right whatever in the demanded premises, or that his mere right is inferior to that set up against him. *Inglis v. Trustees of Sailor's Snug Harbor*, 3 Pet. 101.

9. In a writ of right on the mise joined on the mere right, under a count for the entire right, a demandant may recover a less quantity than the entirety. *Ib.*

10. (Dec., 1853.) A tenant in common may bring a real action, by a writ of right, for his undivided moiety of the property, in the Circuit Courts. *Homer v. Brown*, 16 How. 354, 681.

11. The writ of right was abolished in Massachusetts, in 1840, but was previously adopted as a process by the acts of Congress of 1789 and 1792. Its repeal by Massachusetts did not repeal it as a process in the Circuit Court of the United States. *Ib.*

Writ. Certiorari.

1. (May, 1854.) A commissioner appointed by this court is, in the execution of the duties of his office, under the act of Sept. 18, 1850 (9 Stat. at Large, 462), commonly called the Fugitive Slave Act, in no legal sense a magistrate inferior to this court.

This court has no power to issue a writ of *certiorari* to such a commissioner to review the proceedings before him under that act. *Ex parte Van Orden*, 3 Blatchf. 166.

2. (Feb., 1866.) The courts of the United States have power, under the fourteenth section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 81), to issue the writ of *certiorari*, as ancillary to the writ of *habeas corpus*, as a means of rendering their jurisdiction under the latter writ effective. *In re Martin*, 5 Blatchf. 303.

3. (Jan., 1871.) An action commenced in a state court against a commissioner of the Circuit Court of the United States, to recover back money alleged to have been illegally exacted by him as costs and fees in a criminal proceeding before him, cannot be removed into this court by *certiorari*, under sec. 67 of the act of July 13, 1866 (14 Stat. at Large, 171), which

provides for the removal of suits commenced against an officer of the United States appointed under, or acting by authority of, the internal revenue law, on account of any act done under color of his office, &c. *Benchley v. Gilbert*, 8 Blatchf. 147.

4. (June, 1873.) Observations on the power of the court to issue a writ of *certiorari*, in a case under a treaty providing for the extradition of fugitives, and on the effect of a warrant of surrender, issued by the President, as a *supersedeas* of such a writ. *In re Macdonnell*, 11 Blatchf. 170.

5. (June, 1874.) The United States Circuit Court has no jurisdiction of a writ of *certiorari* to a state court, for the removal of proceedings by the state against a railroad company, under the Illinois act of May 2, 1873. *State of Illinois v. Railroad Co.*, 6 Biss. 107.

Writ of Prohibition.

1. (Feb., 1870.) Under the fourteenth section of the Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 81), this court has power to issue a writ of prohibition only in cases where such writ is necessary for the exercise of its jurisdiction. *In re Biningger*, 7 Blatchf. 159.

2. Where C. had, jointly with B., his copartner, been adjudged a bankrupt by the decree of the District Court, and had brought such decree before this court for review, and was also prosecuting suits in a state court against B., in respect to the property of the copartnership and the proceedings in the District Court, — *Held*, that this court had no authority to issue a writ of prohibition to the state court, from further entertaining such suits. *Ib.*

Writ. Quo Warranto.

1. (Feb., 1820.) An information for a *quo warranto*, to try the title to an office, cannot be maintained but at the instance of the government; and the consent of parties will not give jurisdiction in such a case. *Wallace v. Anderson*, 5 Wheat. 291.

2. (Dec., 1865.) A proceeding in the nature of a *quo warranto*, in one of the territories of the United States, to test the right of a person to exercise the functions of a judge of a Supreme Court of the territory, must be in the name of the United States, and not in the name of the territory. If taken in the name of the

territory, the error may be taken advantage of on demurrer, and it is fatal. *Territory v. Lockwood*, 3 Wall. 236.

Writ. Scire Facias.

1. (Feb., 1814.) By the law of South Carolina the thirty-day rule is substituted for a *scire facias* to a judgment in those cases only where lapse of time prevents the plaintiff from suing out execution. *Griffith v. Frazier*, 8 Cranch, 10.

2. (Feb., 1817.) A. L. brought an action of assumpsit in the Circuit Court, and, after issue joined, the plaintiff died, and the suit was revived by *scire facias* in the name of his administratrix. While the suit was still depending the administratrix intermarried with F. A., which marriage was pleaded *puis darrein continuance*. Held, that the *scire facias* was thereupon abated, and a new *scire facias* might be issued to revive the original suit in the name of F. A. and wife, as the personal representative of A. L., in order to enable her to prosecute the suit until a final judgment, under the Judiciary Act of 1789, ch. 20, s. 31. *M' Coul v. Lekamp*, 2 Wheat. 111.

3. (Jan., 1840.) In a *scire facias* to revive a judgment in ejectment, where it is stated that the term recovered is yet unexpired, this is sufficient. It is not required that the term as laid in the declaration and that facts showing its continuance should be stated. *Walden v. Craig*, 14 Pet. 147.

4. (May, 1812.) The pendency of a commission of insolvency is no bar to a *scire facias* against an administrator on a judgment had against him. *Hatch v. Eustis*, 1 Gall. 160.

5. If, after verdict, and before judgment, the defendant die, and his administrator become party to the suit, and judgment pass against him, and execution issue thereon and be returned unsatisfied, on *scire facias* against the administrator he may well plead no assets, or insolvency, for he had no time to plead such plea in the original suit. *Ib.*

6. *Quere*, in such a case, if any execution ought to have issued on the original judgment, until after a *scire facias* against the administrator. *Ib.*

7. (Oct., 1826.) The King of Great Britain granted a charter of a town in that part of the province of New Hampshire which is now Vermont, to be divided among the grantees, and to be

held on certain conditions mentioned in the charter. The defendants, who were one of the grantees, were a society in England, incorporated by a charter from the king. A *scire facias* was issued on behalf of the plaintiffs, requiring the defendants to show cause why a forfeiture of their right to the lands had not been incurred, and assigning as grounds of forfeiture a non-performance of the conditions on which the lands were held and violations of their charter of incorporation. On demurrer to the *scire facias*, — *Held*, that such violations of their charter of incorporation could not be thus collaterally drawn in question, but that it should be vacated by some direct proceeding for the purpose. *Vermont v. Society, &c.*, 1 Paine, 652.

8. There was no declaration; but the writ of *scire facias* was demurred to. *Held*, that the legal effect was the same as if the demurrer had been to the declaration; and the same judgment was ordered to be entered. *Ib.*

9. (April, 1816.) To a *scire facias* against an executor to revive a judgment obtained against his testator, the defendant cannot plead that there are terre-tenants whose lands are also bound by the judgment, so as to oblige the plaintiff to sue out a *scire facias* against them. *Wilson v. Watson*, Pet. C. C. 269.

10. The proper remedy for persons aggrieved by proceedings under such a judgment is an *audita querela*, or by obtaining a rule of court to stay proceedings. *Ib.*

11. The court in such a case will, if necessary, direct an issue to ascertain the facts. *Ib.*

12. (April, 1817.) After a conveyance to a third person of the land which has been recovered in an ejectment, a *scire facias* and a *habere facias* must issue in the name of the plaintiff in the original judgment. *Lessee of Penn v. Klyne*, Pet. C. C. 446.

13. Where the lessor of the plaintiff dies after judgment in ejectment, the execution may issue in the name of the lessee, without the necessity of a *scire facias*. *Ib.*

14. In every case where a *scire facias* issues to revive a judgment it is a continuation of the original suit, and may issue in the name of the original plaintiff or of those claiming as his legal representatives, although such representative should be a citizen of the same state with the defendant. *Ib.*

15. (May, 1869.) A verdict having been obtained in 1860, no further proceedings are had in the cause until 1867. In the

mean time the record has been destroyed. The plaintiff may file a transcript of the record in his possession, upon which a judgment may be entered as upon the original record. *Baldwin v. Lamar*, Chase, 432.

16. In such case, the defendant having died in the mean time, his personal representative must be made a party; and a rule served to show cause why the transcript should not be filed does not operate to make him a party. *Ib.*

17. It seems that when the personal representative is a non-resident, it should be done by *scire facias*. *Ib.*

18. The copy of the record produced was in the possession of the plaintiff. *Ib.*

19. (June, 1846.) A judgment being entered on the penalty of a bond to save harmless the creditors of a certain firm, by paying the amount due or to become due, may be enforced by *scire facias* on the judgment to show cause why execution should not issue, &c. *Bergen v. Williams*, 4 McLean, 125.

20. A judgment against the late firm is conclusive as to the amount due. *Ib.*

21. The condition of the bond was that the obligors should pay the creditors, and not one of the late firm. *Ib.*

WRIT. EXECUTION. VENDITIONI EXPONAS.

1. (Dec., 1801.) Money may be taken in execution, if in the possession of the defendant. *Turner v. Fendall*, 1 Cranch, 116.

2. (Feb., 1825.) The proceedings on executions, and other process, in the courts of the United States, in suits at common law, are to be the same in each state, respectively, as were used in the Supreme Court of the state in September, 1789, subject to such alterations and additions as the said courts of the United States may make, or as the Supreme Court of the United States shall prescribe by rule, to the other courts. *Wayman v. Southard*, 10 Wheat. 1.

3. A state law regulating executions, enacted subsequent to September, 1789, is not applicable to executions issuing on judgments rendered by the courts of the United States, unless expressly adopted by the regulations and rules of those courts. *Ib.*

4. The thirty-fourth section of the Judiciary Act of 1789, ch. 20, which provides "that the laws of the several states, except," &c.,

"shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply," does not apply to the process and practice of the courts. It is a mere legislative recognition of the principles of universal jurisprudence, as to the operation of the *lex loci*. *Ib.*

5. The statutes of Kentucky concerning executions, which require the plaintiff to indorse on the execution that bank-notes of the Bank of Kentucky, or notes of the Bank of the Commonwealth of Kentucky, will be received in payment, and, on his refusal, authorize the defendant to give a replevin bond for the debt, payable in two years, are not applicable to executions issuing on judgments rendered by the courts of the United States. *Ib.*

6. The case of *Palmer v. Allen* (7 Cranch, 550) reviewed, and reconciled with the present decision. *Ib.*

7. (Feb., 1825.) The act of assembly of Kentucky of the 21st of December, 1821, which prohibits the sale of property taken under executions for less than three-fourths of its appraised value, without the consent of the owner, does not apply to a *venditioni exponas* issued out of the Circuit Court for the District of Kentucky. *Bank of United States v. Halstead*, 10 Wheat. 51.

8. The laws of the United States authorize the courts of the Union so to alter the form of the process of execution used in the Supreme Courts of the states in 1789 so as to subject to execution lands and other property not thus subject by the state laws in force at that time. *Ib.*

9. (Jan., 1832.) In respect to suits at common law, it is true that the laws of the United States have adopted the forms of writs and executions and other process, and the modes of proceeding authorized and used under the state laws, subject, however, to such alterations and additions as may from time to time be made by the courts of the United States. But writs of execution issuing from the courts of the United States, in virtue of those provisions, are not controlled or controllable, in their general operation or effect, by any collateral regulations and restrictions which the state laws have imposed upon the state courts to govern them in the actual use, suspension, or superseding of them. Such regulations and restrictions are exclusively addressed to the state tribunals, and have no efficacy in the courts of the United States, unless adopted by them. *Boyle v. Zacharie*, 6 Pet. 648.

10. (Jan., 1833.) Ejectment. On the 12th of February, 1807, an attachment was regularly issued by the court of Williamson County, Tennessee, and was, on the 13th of the same month, levied on a tract of land, the property of the defendant in the suit. Judgment by default was entered on the 15th of October, 1807 ; the property was, on motion, condemned, and a writ of *venditioni exponas* issued on the 24th, which came into the hands of the sheriff on the 28th of October, who sold the property under it on the 2d of January, 1808. The county of Williamson was divided on the 16th of November, 1807, and that part of the land for which this ejectment was brought lay in the new county, called Maury. *Held*, that the process of execution for the sale of the land, under which it was sold by the sheriff, was a direction to the sheriff to sell the specific property, which was already in his possession, by virtue of the attachment, and was already condemned by the competent tribunal. The subsequent division of the county could not divest his vested interest, or deprive the officer of the power to finish a process which was already begun. *Tyrell v. Roundtree*, 7 Pet. 464.

11. (Jan., 1835.) The Process Act of 1798 expressly adopts the mesne process, and modes of proceeding in suits at common law, then existing in the highest state court, under the state laws, which of course included all the regulations of the state laws as to bail, and exemptions of the party from arrest and imprisonment. In regard, also, to writs of execution, and other final process, and "*the proceedings thereupon*," it adopts an equally comprehensive language, and declares they shall be the same as were then used in the courts of the state. *Beers v. Haughton*, 9 Pet. 329.

12. The rule of the Circuit Court is in perfect coincidence with the state laws existing in 1828 ; and, if it were not, the Circuit Court had authority by the very provisions of the act of 1828 to make such a rule, as a regulation of the proceedings upon final process, so as to conform the same to those laws of the state on the same subject. *Ib.*

13. The cases of *Sturges v. Crowninshield* (4 Wheat. 200 ; 4 Cond. Rep. 409), *Mason v. Haile* (12 Wheat. 370 ; 6 Cond. Rep. 535), *Wayman v. Southard* (10 Wheat. 1 ; 6 Cond. Rep. 1), *United States Bank v. Halstead* (10 Wheat. 51 ; 6 Cond. Rep. 22), cited. *Ib.*

14. (Dec., 1853.) Three judgments were entered up against a debtor on the same day.

One of the creditors issued a *capias ad satisfaciendum* in February, and the other two issued writs of *feri facias* upon the same day in the ensuing month of March.

Under the *ca. sa.* the defendant was taken and imprisoned until discharged by due process of law. The plaintiff then obtained leave to issue a *fi. fa.*, which was levied upon the same land previously levied upon. The marshal sold the property under all the writs.

The executions of the first *fi. fa.* creditors are entitled to be first satisfied out of the proceeds of sale. *Rockhill v. Hanna*, 15 How. 189.

15. Each creditor having elected a different remedy is entitled to a precedence in that which he has elected. *Ib.*

16. Besides, the *ca. sa.* creditor by imprisoning the debtor postponed his lien, because it may happen, under certain circumstances, that the judgment is forever extinguished. If these do not happen, his lien is not restored, as against creditors who have obtained a precedence during such suspension. *Ib.*

17. (Dec., 1863.) Independently of a rule of court, execution cannot issue in a decree for foreclosure of a mortgage in chancery for the balance left due after a sale of the mortgaged premises (*Noonan v. Lee*, 2 Black, 499, recognized); and this (by opinion, however, of but a majority of the court) applies to the territorial court of Nebraska, as much as to the courts of states organized under the Judiciary Act of 1789. *Orchard v. Hughes*, 1 Wall. 74.

18. (Oct., 1876.) Sec. 1007 of the Revised Statutes, which, as amended by the act of Feb. 18, 1875 (18 Stat., part 3, p. 316), provides that, where a writ of error may operate as a *supersedeas*, execution shall not issue until the expiration of ten days after the rendition of the judgment, has reference only to the judgments of the courts of the United States. *Doyle v. Wisconsin*, 4 Otto, 50.

19. (May, 1813.) If chattels are sold on an execution, the regularity of such sale cannot be contested by mere strangers. *Meeker v. Wilson*, 1 Gall. 419.

20. (April, 1815.) A *feri facias* issued in 1806, under which there was a levy and condemnation of the real estate of the defendant, and afterwards a *venditioni* was taken out. The levy, inquisition, and *venditioni* were quashed. Afterwards the defend-

ant died. In 1813, a *feri facias* was issued, and a levy made on sundry lots in the hands of persons, purchasers thereof since the judgment. This execution was quashed on the ground that the judgment ought to have been revived against the defendant's executors, in order to make it the foundation of this process; although it might have been different had an *alias fieri facias* been taken out and continuances entered. *Wilson v. Hurst*, Pet. C. C. 140.

21. The court will not willingly listen to a motion to set aside an execution on the ground that other property in the hands of purchasers from the defendant after the judgment, and liable to contribute, might have been levied on. *Ib.*

22. *Quere*, if notice ought not to have been given to the plaintiff, that there was such property, in order to furnish him with an opportunity to levy upon it. *Ib.*

23. (Oct., 1811.) It is a fatal objection to an execution, that it issued more than a year and a day after the judgment, without a *scire facias* having been issued to revive the judgment. *Azcarrati v. Fitzsimmons*, 3 Wash. 134.

24. (April, 1823.) An execution cannot issue until the expiration of ten days from the judgment; and if it issues, the court will set it aside, on motion. *Bobyshall v. Oppenheimer*, 4 Wash. 388.

25. (Nov., 1871.) When a writ of *venditioni exponas*, issued from the Circuit Court, ran in the name of the President of the United States, bore *teste* of the Chief Justice of the United States, was under the seal of the court, but was not signed by the clerk but by the deputy clerk in his own name, neither the writ nor the proceedings under it are void. *Griswold v. Connolly*, 1 Woods, 193.

26. The defect in the writ [of *venditioni exponas*, that it was not signed by the clerk, but by the deputy clerk in his own name] could only be taken advantage of in a direct, and not in a collateral, proceeding. *Ib.*

Writ of Error.

1. (May, 1812.) A writ of error is the proper process to correct the errors of the District Court in common-law actions. *United States v. Wonson*, 1 Gall. 4.

2. (June, 1850.) A judge of this court, sitting at chambers, has power to allow a writ of error, under sec. 17 of the Patent Act of July 4, 1836 (5 Stat. at Large, 124), which declares that, in patent cases, writs of error shall lie as in other cases, and "in all other cases in which the court shall deem it reasonable to allow the same." *Footte v. Silsby*, 1 Blatchf. 542.

3. (April, 1870.) When property is seized upon land and libelled as forfeited to the United States, for violation of the revenue laws, the case belongs to the common-law side of the court, and can only be reviewed by writ of error. *United States v. Thirty-seven Barrels of Rum*, 1 Woods, 19.

4. When such a case is appealed, the appeal will be dismissed. *Ib.*

5. (April, 1872.) If in the copy of a writ of error lodged with the clerk of the court, for the defendant in error, the return-day of the writ is correctly stated, and the record be actually returned and filed in due time, a mere clerical error in the return-day in the original writ is immaterial and is cured. *United States v. Six Lots of Ground*, 1 Woods, 234.

6. (Oct., 1868.) To the general rule, that the writ of error will be entertained and the judgment affirmed, unless the record shows some error of which the revisory court can take cognizance, there are exceptions. In exceptional cases, the writ will be dismissed without prejudice to another writ, or to an effectual process to remove the cause. *Ruddick v. Billings*, Woolw. 331.

Writ of Error Coram Nobis.

1. (May, 1810.) The twenty-second section of the original Judiciary Act, limiting the period within which writs of error may be brought to five years after the rendition of the judgment or decree complained of, applies only to writs of error in law, and does not extend to writs of error *coram nobis*. *Strode v. The Stafford Justices*, 1 Brock. 162.

2. (May, 1814.) An action of debt is brought on a bond; the verdict as rendered by the jury is for the penalty to be discharged by the sum expressed in the condition, with interest till paid; but, by the misprision of the clerk, the verdict is entered for the smaller sum of damages, without interest, and the judgment is entered for the penalty to be discharged by those

damages without interest. It seems that, for this misprision, the judgment might have been reversed by writ of error *coram nobis*. *Alston v. Munford*, 1 Brock. 266.

3. (April, 1874.) Defendant moved to set aside judgment taken on a promissory note, on the ground that the maker of the note was at the beginning of the suit a married woman. *Held*, that the fact of coverture at the commencement of the suit and entry of judgment are questions of fact, and that a writ of error *coram nobis* will lie. *Albree v. Johnson*, 1 Flipp. 341.

4. That on motion and affidavits the judgment may be reversed and set aside at any time during the coverture and before the satisfaction of the judgment. *Ib.*

5. The motion in place of the writ is less expensive, and the more modern practice. The appropriate use of the writ of error *coram nobis* is to enable a court to correct its own errors. *Ib.*

6. (Nov., 1831.) A writ of error *coram nobis* is issued by a court to reverse its own judgment. *Legerwood v. Pickett*, 1 McLean, 143.

7. If a demise be extended without notice, those who are prejudiced by the order should be heard on a writ of error [*coram nobis*] or by motion, and the amendment should be set aside if injurious to their interests. *Ib.*

8. This remedy is generally given on motion, a notice having been served on the opposite party. *Ib.*

PLEADINGS AND PRACTICE IN CRIMINAL CASES.

Indictments. Generally.

1. (Aug. 1807.) *Quære*: Whether a person who procures an act can be indicted as having performed that act. *United States v. Burr*, Appendix, 4 Cranch, 503.

2. (Dec., 1872.) Where a statute defining an offense contains an exception in the enacting clause of the statute, which is so incorporated with the language defining the offense, that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, an indictment founded upon the statute must allege enough to show that the accused is not

within the exception. But if the language of the section defining the offense is so entirely separable from the exception, that the ingredients constituting the offense may be accurately and clearly defined, without any reference to the exception, the indictment may omit any such reference. The matter contained in the exception is matter of defense, and to be shown by the accused. *United States v. Cook*, 17 Wall. 168.

3. (Oct., 1834.) A conclusion of an indictment against the form of the statute (in the singular) is sufficient in all cases where the offense is distinctly within more than one independent statute. *United States v. Gibert*, 2 Sumn. 21.

4. Also a conclusion against the form of the statutes (in the plural) would be good, even if the offense were punishable by a single statute only. *Ib.*

5. (Oct., 1837.) A variance between the indictment and the evidence is not material, provided the substance of the matter be found. *United States v. Howard*, 3 Sumn. 12.

6. In case of misnomer, a variance is fatal only where there is a misnomer of a party whose existence is essential to the offense charged in the indictment. *Ib.*

7. Mere surplusage will not vitiate an indictment, and need not be established in proof. *Ib.*

8. But no allegation, whether it be necessary or unnecessary, more or less particular, which is descriptive of the identity of what is legally essential to the charge in the indictment can be rejected as surplusage. *Ib.*

9. (May, 1846.) It is not a misjoinder of offenses in different counts in the same indictment, unless they belong to different families, or the judgments and punishments are inconsistent with each other. *United States v. Peterson*, 1 Woodb. & M. 306.

10. (May, 1847.) When an indictment describes in different counts different offenses, and of different grades and punishments, implied from the same transaction, and the verdict is, "guilty of the last count only," judgment may properly be rendered on the verdict. *United States v. Stetson*, 3 Woodb. & M. 164.

11. (Oct., 1859.) The designation "foreman" appended to the name of the person signing the indictment as such, is sufficient, as the designation "foreman" refers to the introductory clause of the indictment and to the record, as verifying the legal

inference that "foreman" means foreman of the grand jury. *United States v. Plumer*, 3 Cliff. 29.

12. (March, 1832.) An indictment for an offense created by statute, charging the same to have been committed "in contempt of the laws of the United States of America," without referring to the statute, is bad. *United States v. Andrews*, 2 Paine, 451.

13. (March, 1868.) In an indictment for a misdemeanor, several offenses may be joined in different counts; and when that is done the prosecution cannot be compelled to elect between the several counts. *United States v. Devlin*, 6 Blatchf. 71.

14. (March, 1876.) A person was indicted by the name of D. K. Olney Winter. He moved to quash the indictment, on the ground that he was not described therein by any Christian name. *Held*, that the motion must be denied. *United States v. Winter*, 13 Blatchf. 276.

15. When a person has selected a particular given name as the only given name by which he will be known, such given name becomes part of his legal name, and he is properly described by that name in an indictment, whether it stands first, or second, or third in the order of his given names. *Ib.*

16. (April, 1815.) An indictment which charges in the same count an offense made capital by one section of an act of Congress, and another offense declared in another section of the same law to be a misdemeanor, is bad. *United States v. Sharp*, Pet. C. C. 131.

17. (Oct., 1825.) The indictment need not negative the fact that the defendant was tried and convicted or acquitted by the foreign tribunal. *United States v. Stevens*, 4 Wash. 547.

18. (April, 1830.) An indictment laying an offense in the words of the law creating it is sufficient as a general rule. *United States v. Wilson and Porter*, Baldw. 79.

19. It need not state the county in which the offense was committed. It is enough if it shows that the court has jurisdiction. Cases of treason are exceptions. *Ib.*

20. (April, 1840.) An indictment which states that the prisoner, "late of the District of Maryland, mariner, on the 31st day of October, 1839, *then and there* being on board a certain brig called," &c., "*on the high seas, and on the Atlantic Ocean, in latitude 33°*, out of the jurisdiction of any particular state, and within the jurisdiction of the United States," . . . "*did then and there*

commit," &c., is bad for repugnancy; and no judgment will be rendered thereon. *United States v. Dow*, Taney's Dec. 35.

21. The words *then and there* mean "at the time and place aforesaid," and in this case refer to *time*, to the thirty-first day of October, 1839, and, as to *place*, to the District of Maryland; and this allegation (which is a substantive one) is repugnant to the subsequent allegation that the offense was committed on the high seas, "*out of the jurisdiction of any particular state.*" *Ib.*

22. The court cannot reject any material allegation in an indictment or information which is sensible and consistent in the place where it occurs, and is not repugnant to any antecedent matter, merely on account of there occurring afterwards, in the same indictment or information, another allegation inconsistent with the former, and which latter allegation cannot itself be rejected. *Ib.*

23. (May, 1839.) An instrument may be set out in an indictment according to its legal effect. *United States v. Keen*, 1 McLean, 429.

24. (Oct., 1842.) The day laid in the indictment is not material, and the offense may be proved to have been committed at any other time. *Johnson v. United States*, 3 McLean, 89.

25. (Oct., 1853.) The caption or title is no part of the presentment of the grand jury, and may be amended after verdict. *United States v. Thompson*, 6 McLean, 56.

26. (July, 1855.) Offenses of the same class may be included in the same indictment. *United States v. O'Callahan*, 6 McLean, 586.

27. Though offenses of different classes may not be joined. This is the English rule. *Ib.*

28. Offenses of the same class, under a statute and at common law in England, may be united in the same indictment. *Ib.*

29. But a late act of Congress requires offenses which may be joined to be included in the same indictment. *Ib.*

30. Offenses committed by substantially the same act, it would seem, ought not to be punished as acts committed at different times and under circumstances wholly disconnected. *Ib.*

31. (1876.) The legislation of Congress (Rev. Stat. s. 1037) authorizing the District Court, by order entered on its minutes, to remit an indictment pending therein to the Circuit Court, does not require that the clerk of the District Court shall trans-

mit the original indictment, but an exemplification of the record, including a certified copy of the indictment. *United States v. McKee*, 4 Dill. 1.

32. (March, 1880.) The withdrawal of a count in an indictment does not render the evidence offered incompetent, so far as it is legally applicable to the counts of the indictment not withdrawn. *United States v. Biebusch*, 1 McCrary, 42.

Indictment. Treason.

1. (Aug., 1807.) In treason the indictment must lay an overt act, which must be proved as laid. *United States v. Burr*, Appendix, 4 Cranch, 490.

2. (Oct., 1863.) An indictment under sec. 2 of the act of Congress of July 17, 1862, need not use the phrase "levying war" specifically; it is sufficient to follow the language of the act. *United States v. Greathouse*, 4 Sawyer, 457.

Indictment. Murder.

1. (April, 1858.) An indictment for murder on the high seas is sufficient, although it describe the grand jury as "jurors of the United States." *United States v. Cox*, 1 Cliff. 5.

2. (June, 1851.) Where a person is present, actually or constructively, at a murder, aiding and abetting it, that is sufficient, both at common law and under the statutes of the United States, to warrant his conviction under an indictment charging him with the murder, though containing no count charging him with only being present at the murder, aiding and abetting it. *United States v. Douglass*, 2 Blatchf. 207.

3. (Oct., 1862.) Where an offense is within a general jurisdiction of a court of the United States, it is not necessary that an indictment for the offense should exclude, by descriptive terms, every possible exemption of the defendant from the jurisdiction. *United States v. Demarchi*, 5 Blatchf. 84.

4. Thus, where a murder committed on a vessel is of such a character that a court of the United States can entertain jurisdiction of it, although the vessel has no national character, no national character need be alleged in the indictment, and it need not negative the possible foreign nationality of the vessel. *Ib.*

5. Under the eighth section of the act of April 30, 1790 (1 Stat. at Large, 113), it is sufficient, in an indictment for a murder committed on board of a vessel on the high seas by an alien, to allege that the vessel was owned by a citizen of the United States, without alleging otherwise the national character of the vessel. *Ib.*

6. (Oct., 1806.) Indictment for murder. The first count laid the stroke and the death on the high seas; the second laid it in the haven of Cape François; the third laid the stroke in the haven of Cape François, and the death on the land in Cape François. The only count proved was the last.

The law of the United States declares that murder committed on the high seas shall be tried in the district where the offender is apprehended, or into which he is first brought; and therefore the Circuit Court has jurisdiction over this case. *United States v. Magill*, 1 Wash. 463.

7. To constitute the offense of murder, under the law of the United States, cognizable in the Circuit Court of the United States, not only the *stroke*, but the *death*, must happen on the high seas. *Ib.*

8. (May, 1864.) Indictment under the act of Feb. 24, 1864 (13 Stat. 8), for murder.

As it must be shown in proof that the *animus* of the assault was roused by the officer's discharge of his duties, the indictment must contain an averment to that effect. *United States v. Gleason*, Woolw. 75.

9. (April, 1847.) There is no act of Congress punishing an accessory before the fact to murder, and an indictment for that offense will be quashed. *United States v. Ramsay*, Hempst. 481.

10. To commit murder, and to be accessory to it, are different and distinct offenses. *Ib.*

Indictment. Manslaughter.

1. (April, 1842.) The indictment charged that the prisoner did commit manslaughter on the high seas, 1st, by casting F. A. from a vessel belonging, &c., whose name was unknown; 2d, by casting him from the long-boat of the ship W. B. belonging, &c. The indictment is sufficiently certain. *United States v. Holmes*, 1 Wall. Jr. 1.

Indictment. Assault with Dangerous Weapon.

1. (March, 1832.) The twenty-second section of the Crimes Act of March 3, 1825 (7 L. U. S. s. 401), providing for the punishment of assaults with dangerous weapons, contemplates a misdemeanor, and not a felony; and in an indictment under the act for such an offense, it is not necessary to charge that the assault was committed feloniously, or with intent to perpetrate a felony. *United States v. Gallagher*, 1 Paine, 447.

2. (Oct., 1879.) An indictment purporting to be founded on sec. 5346 of the Revised Statutes, charging the commission of an assault with a dangerous weapon on board a vessel belonging in whole or in part to a citizen of the United States, alleged the assault to have taken place "in the harbor of Guantanamo, in the Island of Cuba," but did not allege that that place was out of the jurisdiction of any state of the United States. *Held*, upon the authority of *United States v. Jackson* (1 Black, 484), that the indictment was bad, for want of such allegation. *United States v. Anderson*, 17 Blatchf. 238.

Indictment. Offense against a Public Minister.

1. (Oct., 1830.) An indictment under the twenty-seventh section of the act of 1790 need not state the offense to be committed by an officer. It is sufficient to state that the person on whom it was committed was a public minister, without stating that he had been authorized and received as such by the President. This section applies to all public ministers. *United States v. Benner*, Baldw. 234.

Indictment. Slave Trade.

1. (Oct., 1820.) If, under the act [of 20th April, 1818, ch. 86, secs. 2 and 3], an offense of causing a vessel to sail from a port of the United States be alleged in the indictment to be on a day now last past, and on divers days and times before and since that day, the allegation is sufficient; for the words *now last past* mean last past before the caption of the indictment, and the words *on divers days and times* may be rejected as surplusage, if the offense be but a single offense. *United States v. La Coste*, 2 Mason, 129.

2. It is not necessary, in an indictment for such an offense, to allege that the negroes, &c., were to be transported to the United States or their territories, or that they were free and not bound to service, or that the defendant was a citizen or resident within the United States, or that the offense was committed on board an American vessel. It is sufficient if the indictment follow in these respects the language of the statute, and is as certain. *Ib.*

3. One of the phrases used in the statute being "persons of color," it is sufficient in the indictment to use the same words without more definite specification of the meaning of the words. *Ib.*

4. It is sufficient, in the indictment for such offense, to allege that the defendant, "as master, for some other person, the name whereof being to the jurors yet unknown," did cause the vessel to sail, &c. *Ib.*

5. (Oct., 1820.) In an indictment founded on the Slave-Trade Act of 20th of April, 1818, ch. 86, secs. 2 and 3, for causing a vessel to sail from a port of the United States, to be employed in the trade, it is sufficient if the indictment alleges that the offense was committed after the passing of the act, at some time between certain specified days, though no day in certain, on which it was committed, is specified. *United States v. Smith*, 2 Mason, 143.

6. It is not necessary, in an indictment on the same act, to aver that the defendant *knowingly* committed the offense. *Ib.*

7. A conclusion of an indictment founded on a statute, "contrary to the true intent and meaning of the act of Congress of the United States in such case made and provided," is good, and is equivalent to a conclusion, "against the form of the statute in such case made and provided." *Ib.*

8. (Nov., 1861.) In such an indictment [under the fifth section of the act of May 15, 1820 (3 Stat. at Large, 601), for forcibly confining and detaining negroes on board of a vessel, with intent to make them slaves], it is sufficient to aver that the defendant forcibly confined and detained the negroes, "they not having been held to service by the laws of either of the states or territories of the United States," without otherwise averring that they were not so held to service at the time of the commission of the offense. *United States v. Gordon*, 5 Blatchf. 18.

9. (Oct., 1855.) In a prosecution under the act of May 15,

1820, for suppressing the slave trade, the act of receiving negroes on the coast of Africa, and of confining and detaining them on shipboard, and the aiding and abetting in confining, form one transaction, and may therefore be joined together in the indictment and prosecution, under different counts; but the selling and delivery of the negroes at the termination of the voyage, as on the coast of Cuba, seems to be a distinct transaction; and if this felony is charged in the same indictment with the other, the prosecution will be made to elect on what counts it will proceed. *United States v. Darnaud*, 3 Wall. Jr. 143.

Indictment. Under Civil Rights Act.

1. (April, 1874.) An indictment under the Enforcement Act, or Civil Rights Bill, for violating civil rights, should state that the offense charged was committed against the person injured, by reason of his race, color, or previous condition of servitude. *United States v. Cruikshank*, 1 Woods, 308.

Indictment. Larceny.

1. (May, 1847.) If articles stolen are alleged to belong to owners "unknown," the indictment is good on its face; and if the owners were, in fact, known, the objection should have been taken to the evidence, at the trial, for a variance, or by special plea. *United States v. Stetson*, 3 Woodb. & M. 164.

2. (July, 1844.) A. and B. deposited certain bank-notes with C. and D., to be forwarded to the bank with certain other notes on the same bank, owned by C. and D.; and the notes having been all stolen from the mail, may be laid in the indictment as the property of C. and D. *United States v. Burroughs*, 3 McLean, 405.

3. One or more good counts in an indictment will sustain a general verdict of guilty, though there be one or more bad counts in it. *Id.*

Indictment. Receiving Stolen Property.

1. (Jan., 1839.) The defendant was indicted for receiving treasury notes of the United States, stolen from the United

States mail. The indictment, in one of the counts, described one of the treasury notes as bearing interest annually of one per centum. A treasury note was offered in evidence bearing interest at one M. per centum ; and parol evidence was offered to show that treasury notes, such as the one offered in evidence, were received by the officers of the government, as bearing interest of one mill per centum per annum, not one per centum per annum. The court held that treasury notes issued by the authority of the act of Congress, passed on the 12th of October, 1838, are promissory notes within the meaning of the act of Congress of 3d March, 1825. *United States v. Hardyman*, 13 Pet. 176.

2. The letter M. which appears on the face of the note offered in evidence, is a material part of the description of the note. *Ib.*

3. When a note is given, payable in foreign coin, the value of each coin in current money must be averred ; and under such averment evidence of the value may be received. *Ib.*

Indictment. Perjury.

1. (May, 1823.) If a statute offense is alleged in the indictment according to the words of the act, it is not vitiated by a conclusion which calls the offense by a wrong name. *United States v. Elliot*, 3 Mason, 156.

2. As if the offense be false swearing under the Pension Act of 1820, ch. 51, the indictment is not vitiated by the jurors' conclusion, "And so the jurors say, &c., that the party did commit wilful and corrupt perjury." *Ib.*

3. (Oct., 1859.) An indictment in this court, for perjury, alleged to have been committed on an examination before A. C., "a commissioner of the United States duly appointed," but not stating how, or by whom, or under what statute, or for what purpose such commissioner was appointed, is bad, on demurrer. *United States v. Wilcox*, 4 Blatchf. 391.

4. The indictment should set out the name and official title of the officer before whom the oath was administered. *Ib.*

5. An indictment for perjury, alleged to have been committed on an examination of a person charged with a crime against a law of the United States, should show what the particular crime was. *Ib.*

6. The act of April 30, 1790 (1 Stat. at Large, 116, 117, secs. 19, 20), in reference to the forms of indictment for perjury and subornation of perjury, does not dispense with the necessity of such averments. *Ib.*

7. (Oct., 1859.) An indictment for subornation of perjury, under sec. 13 of the act of March 3, 1825 (4 Stat. at Large, 118), averred that the defendant did feloniously, knowingly, and willingly procure B. to swear falsely, in the taking of an oath, &c., but did not aver that B. knowingly and willingly swore falsely. *Held*, on demurrer, that the indictment was bad. *United States v. Wilcox*, 4 Blatchf. 393.

8. (June, 1869.) Where, in an indictment for perjury, the averments as to the materiality of what it alleges to have been falsely sworn to are defective, the indictment is, nevertheless, good, if such materiality sufficiently appears upon its face. *United States v. McHenry*, 6 Blatchf. 504.

9. What are proper averments of materiality, in an indictment for perjury, considered. *Ib.*

10. (April, 1877.) An indictment for subornation of perjury must aver that the defendant knew that the testimony which he instigated the suborned witness to give was false, and that in giving such testimony the witness would willfully and corruptly commit the crime of perjury. *United States v. Dennee*, 3 Woods, 39.

11. (Feb., 1856.) Any discrepancy between what the defendant swore to, and what is set out in the indictment as having been sworn to by him, is fatal. *United States v. Coons*, 1 Bond, 1.

12. (June, 1844.) In an indictment for perjury, under the Bankrupt Law [of Aug. 19, 1841], in not giving a true and full account of the property of the petitioner, the items on the schedule need not be stated in the indictment. *United States v. Chapman*, 3 McLean, 390.

13. The allegation that the property was omitted with intent to defraud A. B. and other creditors, is sufficient. *Ib.*

14. (June, 1845.) Where such words of description are used in an indictment as to have an application only to the proper person, it is sufficient, although the words of the statute be not used. *United States v. Deming*, 4 McLean, 3.

15. On a charge of perjury by a petitioner in bankruptcy

[under the Bankrupt Act of Aug. 19, 1841], the indictment need not set out, particularly or substantially, the petition. *Ib.*

16. A general reference to it, which shall show its character and object, is sufficient. *Ib.*

17. (June, 1846.) A voluntary or extra-judicial oath is not perjury. The indictment should charge that the oath was false, and known to be so by the witness. *United States v. Babcock*, 4 McLean, 113.

18. Also the motive must be stated in the indictment to be corrupt, or words equivalent. *Ib.*

Indictment. Forgery.

1. (Jan., 1850.) Where an act of Congress declared that if any person "shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited, every such person shall be deemed and adjudged guilty of felony," &c.,—it was sufficient that the indictment charged the act to have been done "with intent to defraud the United States," without also charging that it was done feloniously, or with a "felonious intent." *United States v. Staats*, 8 How. 41.

2. (May, 1822.) In an indictment for forgery, it is in general necessary to set forth the tenor of the instrument, and it must be proved as it is set forth. *United States v. Britton*, 2 Mason, 464.

3. It seems that if the instrument be destroyed or suppressed by the prisoner, that fact being stated in the indictment will be a sufficient excuse for not setting forth the tenor. *Ib.*

4. (Nov., 1847.) An indictment for forgery, under sec. 19 of the act of March 3, 1825 (4 Stat. at Large, 120), in altering a certificate issued under sec. 41 of the act of March 2, 1799 (1 Stat. at Large, 659), alleging that the certificate was issued by the collector *ex officio*, is bad on demurrer. *United States v. Schoyer*, 2 Blatchf. 59.

5. By the act of 1799, the certificate was to be issued by the *supervisor* of the revenue; and the indictment ought to allege that the collector was designated by the President to fulfill the

duties of supervisor, under the act of March 3, 1803 (2 Stat. at Large, 243), and that the certificate was granted by the collector in that capacity. *Ib.*

6. (March, 1879.) An indictment under sec. 5463 of the Revised Statutes of the United States, which charges a person with having forged a material indorsement on a post-office money order, with intent to defraud C., charges what is an offense against the United States. *United States v. Morris*, 16 Blatchf. 133.

Indictment. Fraud.

1. (May, 1820.) In an indictment on the seventh and ninth sections of the act granting a bounty to vessels employed in the cod fisheries (act of 29th July, 1813, ch. 34), for making a false declaration, the indictment having stated the purport of the written paper to be that the vessel was of the burthen of 14 tons and 45-95ths of a ton, whereas the paper produced stated it to be 14 tons and 50-95ths of a ton, the variance was held fatal. *United States v. Lakerman*, 2 Mason, 229.

2. (Oct., 1868.) Under sec. 44 of the Bankrupt Act of March, 1867, it was objected to an indictment that it did not sufficiently allege that the accused had attempted to account for certain of his property by fictitious losses, and that he had secreted and concealed certain portions of his property after the commencement of proceedings in bankruptcy. The indictment alleged that the defendant was lawfully adjudged a bankrupt; that after commencement of proceedings in bankruptcy, he was required by the District Court to submit to examination on oath, as to the disposal and condition of his property; that such examination was held; that the bankrupt was sworn to make true answers; and that he attempted to account for a certain item of property, with intent to defraud his creditors, by a fictitious loss. *Held*, that the objection as to the sufficiency of the allegation could not be sustained. *United States v. Crane*, 3 Cliff. 211.

3. An averment in the indictment that the defendant was lawfully adjudged a bankrupt was sufficient to admit the record. *Ib.*

4. Such an averment is only a preliminary allegation to let in the record of the examination, which is itself a proceeding in bankruptcy. *Ib.*

5. The objection that the averment of a conclusion is insufficient is not applicable to the one in this case, which was only essential to lay the foundation for the admission of the record to which it refers. *Ib.*

6. If this were not so, then it would be necessary to set out the whole record in the indictment. *Ib.*

7. Where, in an indictment, it was alleged, in substance, that the property falsely accounted for belonged to the bankrupt, and was assignable under the Bankrupt Act, — *Held*, that such averment was equivalent to charging that the property was that of the defendant. *Ib.*

8. (July, 1859.) An indictment founded on the act of March 3, 1823 (3 Stat. at Large, 771), and charging the defendant with knowingly transmitting false papers to the Pension Office, in support of applications for bounty land, under sec. 9 of the act of March 3, 1855 (10 id. 702), and containing 138 counts, each for a distinct felony, and some of which charged subornation of perjury, was objected to, on a motion to quash, because of the joinder in it of distinct felonies, and also of felonies of different grades. *Held*, that the indictment was warranted by the act of Feb. 26, 1853 (10 id. 162), but that the counts for subornation of perjury must be stricken out. *United States v. Bickford*, 4 Blatchf. 337.

9. (Jan., 1871.) An indictment under sec. 44 of the Bankrupt Act of March 2, 1867 (14 Stat. at Large, 539), purporting to charge the offense of secreting property by the debtor, with intent to prevent it from coming into the possession of his assignee in bankruptcy, will be quashed where it merely avers the commencement of proceedings in involuntary bankruptcy pursuant to the act, without describing the proceedings except by the names of the petitioning creditors, and the words "pursuant to the act," and without naming the court, or the time, or the place where the proceedings were instituted. *United States v. Latorre*, 8 Blatchf. 134.

10. (June, 1870.) In an indictment under sec. 44 of the Bankrupt Act, for obtaining goods on credit with intent to defraud, the proceedings in the bankrupt court must be pleaded and proved with such particularity as to show affirmatively that an adjudication of bankruptcy was made upon a case in which the court had jurisdiction. *United States v. Prescott*, 2 Biss. 325.

11. The indictment, therefore, should set out the filing of the petition, the name of the petitioning creditor, the amount of his debt, the alleged act of bankruptcy, and the adjudication of the bankrupt court. *Ib.*

12. The description of the goods obtained, as "a large quantity of boots and shoes," is too uncertain. It should be as definite as would be required in a declaration in trover. *Ib.*

13. Offenses under sec. 44 are misdemeanors, and the word "feloniously" should not be used. *Ib.*

14. Dates should not be specified by figures in an indictment. *Ib.*

Indictment. Counterfeiting.

1. (Dec., 1870.) Nor is an indictment pursuing the language of the statute [of Feb. 25, 1862, to punish the counterfeiting of treasury notes] bad because it describes the note passed by the prisoner as a false, forged, and counterfeit note of the United States, issued under the authority of that statute or of other statutes authorizing the issue of such notes. *United States v. Howell*, 11 Wall. 432.

2. (April, 1875.) In an indictment for uttering a counterfeit bill, if the bill is incorrectly described in respect to its bill number, the variance is fatal. *United States v. Mason*, 12 Blatchf. 497.

3. Where such an indictment purports to set forth an exact copy of the bill, the description set forth, though needlessly particular, must conform to the instrument given in evidence. But a mere literal variance will not be fatal. A variance is literal when it does not make a word different in sense and grammar, but leaves the sound and sense in substance the same. *Ib.*

4. An indictment for uttering a counterfeit United States note gave incorrectly the abbreviations of certain Latin words which formed an inscription upon the seal of the Treasury of the United States, as stamped on all genuine United States notes. The indictment contained letters upon what was intended to be a copy of such seal; but those letters did not form the abbreviations found in the note offered in evidence, nor did they form any word, Latin or English. *Held*, that as the inscription on the seal on the note contained no complete word, and as the letters set forth in the indictment, as the description, did not form any word, either

Latin or English, it was impossible to say that any word had been omitted or incorrectly given, and the variation was one in respect of letters, and was not fatal. *Ib.*

5. The indictment omitted the word "to" from the phrase "pay to the bearer." *Held*, that the variance was not material. *Ib.*

6. The indictment inserted the word "on" before the word "duties" in the phrase "all other dues to the United States, except duties." *Held*, that the variance was unimportant. *Ib.*

7. The indictment used the words "counterfeited bill," while the note read "counterfeit bill." *Held*, that this was merely a literal variance. *Ib.*

8. (Dec., 1879.) An indictment under secs. 5431 and 5434 of the Revised Statutes, in setting out counterfeit notes, did not exhibit any imprint of the seal of the Treasury, while the notes put in evidence on the trial exhibited such imprint. *Held*, that there was no such variance as to make it improper to admit the notes in evidence. *United States v. Bennett*, 17 Blatchf. 357.

9. The indictment is not bad for not giving a fac-simile of the seal to which it refers, or for not setting out the numbers on the notes. *Ib.*

10. The indictment properly charges in different counts different offenses, under secs. 5431 and 5434, for which different punishments are prescribed by those sections, the offenses charged being of the same class of crimes, such joinder being permitted by sec. 1024. *Ib.*

11. Whether the offenses were "properly joined" under sec. 1024 was a question to be determined on motion to quash or to compel an election. *Ib.*

12. (Nov., 1873.) An indictment based on the twenty-first section of the act approved March 3, 1825 (4 Stat. 121), which names the person whom the accused intended to defraud by the passing of the counterfeit coin, need not also name the person to whom the coin was passed. *United States v. Bejandio*, 1 Woods, 294.

13. (Oct., 1849.) In an indictment framed on the twentieth section of the Crimes Act of the 3d of March, 1825, it is not a misjoinder to add to the counts charging the making of false coin a count for aiding and assisting in making such coins, and one for procuring them to be made. *United States v. Burns*, 5 McLean, 24.

14. One or more good counts in an indictment, though there may be some that are bad, will sustain a general verdict of guilty. *Ib.*

15. The designation in the indictment of the coins alleged to have been made, as coins called fifty-cent pieces and twenty-five cent pieces, instead of the half dollar and the quarter dollar, by which names they are called in the act of Congress regulating the coinage of the country, is not a material variance, and will not support a motion in arrest of judgment. *Ib.*

Indictment. Under Navigation Laws.

1. (May, 1832.) In an indictment founded on the Crimes Act of 1790, ch. 9, s. 12, for an endeavor to commit a revolt, and for confining the master of the ship on the high seas, it is not necessary to allege that the master was at the time in the peace of the United States, or that he was an American citizen. *United States v. Thompson*, 1 Sumn. 168.

2. (Oct., 1834.) The indictment charged the piracy to have been committed "on the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular states." *Held*, that this was a sufficient statement of the *venue*, without any further specification of place. *United States v. Gibert*, 2 Sumn. 21.

3. (Oct., 1837.) In an indictment under the act of Congress of 1825, ch. 276, s. 5, the ownership of the vessel was alleged to be in *William Nye* and others, instead of *Willard Nye* and others, — *Held*, that an allegation of the *particular* ownership is unnecessary and immaterial, and that the misnomer above mentioned is of no consequence, it being sufficient to allege that the owners are citizens of the United States. *United States v. Howard*, 3 Sumn. 12.

4. (Oct., 1859.) The indictment averred that the alleged crime was committed in and on board of a certain ship called the "Junior," then and there owned by and belonging to four persons therein named, all of whom are alleged to be citizens of the United States; and also contained the further allegation that all the criminal acts of the prisoner were committed within the admiralty and maritime jurisdiction of the United States, and within the jurisdiction of the court, and out of the jurisdiction of

any particular state of the United States. *Held*, that there is a sufficient averment that the Circuit Court had jurisdiction, and that the injured party was within and under the protection of the United States, and in the peace thereof. *United States v. Plumer*, 3 Cliff. 28.

5. (Jan., 1860.) Where the offense of wilfully setting fire to a ship at sea, with intent to burn her, under sec. 7 of the act of July 29, 1850 (9 Stat. at Large, 441), being a felony, was charged in an indictment in the words of the statute,—*Held*, that it was not necessary that the indictment should charge that the offense was committed feloniously. *United States v. McAvoy*, 4 Blatchf. 418.

6. (March, 1860.) The crime of endeavoring to make a revolt on-board of a vessel is one against the master of the vessel; and it is sufficient to charge it in the words of the act of 1835 [4 Stat. at Large, 776], to give the court cognizance of it, even within the requirements of the act of 1825 [4 Stat. at Large, 115, s. 5]. *United States v. Seagrist*, 4 Blatchf. 420.

7. (April, 1806.) The words in the indictment, that the defendant destroyed the vessel “with intent to gain corrupt advantage to himself,” are mere surplusage, and need not be proved. It is necessary to state that “the intent was to prejudice the underwriters.” *United States v. Johns*, 1 Wash. 363.

Indictment. Under Postal Laws.

1. (May, 1853.) The description of the termini, between which the letter was intended to be sent by post, cannot be rejected as surplusage, but must be proved as laid. *United States v. Foye*, 1 Curt. C. C. 364.

2. It is necessary, in an indictment for larceny from a letter, under the twenty-first section of the act [Post-Office Act, 4 Stat. at Large, 102], to lay the property stolen on some person other than the prisoner. *Id.*

3. (May, 1855.) In indictments for misdemeanors, it is sufficient to lay the charge in the words of the act of Congress describing the offense, unless it appears that those words include cases not intended by the legislature to be embraced within the laws; in that event the indictment must show the case to be one not thus excluded. *United States v. Pond*, 2 Curt. C. C. 265.

4. In such an indictment [under the twenty-second section of the act of March 3, 1825 (4 Stat. at Large, 109), for opening a letter, &c.], it is not necessary to allege any venue of the unlawful intent, nor to allege that the opening was unlawful, nor that A. B., to whom the letter was addressed, was a real person, if it be alleged that the letter was opened with intent to obstruct A. R.'s correspondence, or pry into his business or secrets; because it will be intended that he was a real person. *Ib.*

5. (Nov., 1867.) An averment in an indictment, under the twelfth section of the act of July 1, 1864 (13 Stat. at Large, 337), for embezzling and destroying a letter containing money, which had come into the possession of the defendant as dead-letter clerk in the post-office at New York, that the letter was intended to be conveyed by post, and that it was a letter addressed and directed to a person named, at Philadelphia, is not an averment that the letter was intended to be conveyed by post from New York to Philadelphia. *United States v. Okie*, 5 Blatchf. 516.

6. It is not necessary to aver, in such indictment, that the letter embezzled was intended to be conveyed to any particular place, an averment that it was intended to be conveyed by post being sufficient. *Ib.*

7. Nor is any averment as to the ownership of the money necessary in such indictment. *Ib.*

8. (April, 1876.) An indictment, under sec. 5467 of the Revised Statutes, against an employee in a post-office, for stealing money from a letter, did not aver that the letter was one intended to be conveyed by mail, or that it had been deposited in any post-office, or in the charge of the defendant, or that it came into his possession in the regular course of his official duty. *Held*, that the indictment was bad. *United States v. Winter*, 13 Blatchf. 333.

9. (April, 1876.) Under sec. 5467 of the Revised Statutes, an indictment against a letter-carrier for embezzling a letter intrusted to him as a carrier, to be carried and delivered by him, is not defective, although it does not aver that the letter had not been delivered to the party to whom it was directed. *United States v. Jenther*, 13 Blatchf. 335.

10. (June, 1876.) In an indictment under sec. 3893 of the Revised Statutes, charging the defendant with depositing in the mail an obscene pamphlet, and also with depositing in the mail a

notice giving information how an article designed for the prevention of conception can be obtained, it is not necessary or proper that the indictment should give a definite or detailed description of the pamphlet. *United States v. Foote*, 13 Blatchf. 418.

11. Sufficient information as to the particular article about which evidence is to be given can be obtained by an order for a bill of particulars, and for the exhibition to the defendant of the article itself. *Ib.*

12. (Feb., 1877.) Under sec. 5467 of the Revised Statutes, an indictment will lie which charges a person employed as a letter-carrier in the postal service, with having embezzled a letter which was intended to be conveyed by mail and contained an article of value, and had been intrusted to him, and had come into his possession as such letter-carrier. *United States v. Pelle-treau*, 14 Blatchf. 126.

13. Said sec. 5467 is not confined to the offense of stealing or taking things out of a letter, packet, or bag. *Ib.*

14. (May, 1879.) It is not necessary that an indictment under that statute [sec. 3893 of the Revised Statutes, as amended by sec. 1 of the act of July 12, 1876 (19 Stat. at Large, 90), which forbid the depositing in the mail of any obscene or indecent publication], in respect to a book, should set forth *in hæc verba* the alleged obscene book, or the alleged obscene passages in it, if the indictment states that such book is so indecent that it would be offensive to the court and improper to be placed on its records, and that, therefore, the jurors do not set forth the same in the indictment, and if the book is sufficiently identified in the indictment for the defendant to know what book is intended. *United States v. Bennett*, 16 Blatchf. 338.

15. The defendant can always procure information of the charge which he is to meet, so far as regards being furnished with a copy of the publication, or with a copy of the alleged obscene parts of it, by applying to the court, before the trial, for particulars. *Ib.*

16. Whether a count in respect to a publication merely, without averring what kind of publication, is bad for uncertainty, *quære. Ib.*

17. It is sufficient if the indictment alleges that the defendant knowingly deposited the obscene book, without alleging that he knew it to be non-mailable matter under the statute. *Ib.*

18. (March, 1880.) The defendant was indicted under sec.

3894 of the Revised Statutes. The first count alleged that he deposited in the mail "a letter and circular" concerning a lottery, setting it forth *in hæc verba*. The second count alleged that he deposited in the mail a circular concerning a lottery, and set forth what the circular purported to announce, but did not set it forth *in hæc verba*. After a verdict of guilty on both counts, the defendant moved in arrest of judgment, and for a new trial on exceptions. *Held*, —

(1.) Under the statute the same paper may be both a letter and a circular, and the paper deposited in this case was both.

(2.) The indictment need not state that the paper was one concerning a lottery "offering prizes."

(3.) The omission, if any, in the first count, of averments to show the illegal quality of the paper, was a defect cured, after verdict, by sec. 1025 of the Revised Statutes, as a defect of form, not tending to the prejudice of the defendant.

(4.) The paper set forth in the first count shows, on its face, that it is such a letter as is within the prohibition of the statute.

(5.) The second count is bad, because it does not set forth the circular *in hæc verba*, and the defect is one which is not cured by said sec. 1025, and one which can be availed of on a motion in arrest of judgment. *United States v. Noelke*, 17 Blatchf. 554.

19. (June, 1869.) An indictment against a member of Congress, for unlawfully franking, need not charge that he franked any letter as a member of Congress, nor that he was a member of Congress when the offense was committed. *Deweese's Case*, Chase, 531.

20. If this were otherwise, the indictment charging that "J. T. D., member of Congress," committed the offense, sufficiently charged that he did it whilst a member of Congress. *Ib.*

21. In an indictment for a statutory offense, it is sufficient if the offense be substantially set forth, though not in the precise words of the act. *Ib.*

22. An allegation in an indictment that a member of Congress franked letters not written by himself, namely, envelopes, which he consented should be used by one C., for the purpose of transmitting through the mail certain matter properly chargeable, with postage, sufficiently excludes the possibility that the letters were written by the order of the defendant, on the business of his office. *Ib.*

23. Though it be *unlawful* for a member of Congress to frank envelopes to be used in transmitting circulars through the mail, it is not *penal*. Such do not come within the meaning of the word "letters," in the act of 1825. *Ib.*

24. (Nov., 1840.) An indictment which charges the defendant with unlawfully abstracting a letter containing bank-notes from the mail is good, if it alleges that the letter containing bank-notes was put into the post-office to be conveyed by post, and was being conveyed by post, and came into the possession of defendant as a driver of the mail stage. *United States v. Martin*, 2 McLean, 256.

25. (June, 1841.) It is not necessary [in the indictment] to give a particular description of a letter charged to have been secreted and embezzled by a postmaster. *United States v. Lancaster*, 2 McLean, 431.

26. Nor to describe the bank-notes, particularly, inclosed in the letter. *Ib.*

27. It is enough to show that the letter came into the hands of the postmaster, in the words of the statute, without showing where it was mailed and on what route it was conveyed. *Ib.*

28. (Oct., 1849.) Where an indictment charges the carrier of the mail with stealing a letter out of it, it is sufficient. *United States v. Fisher*, 5 McLean, 23.

29. If the letter contain an article of value, it must be so averred in the indictment, to subject the defendant to the incurred penalty. *Ib.*

30. But as it is an offense to steal a letter which contains no article of value, it is not necessary to aver that it contained no such article. *Ib.*

31. (June, 1855.) In an indictment for embezzlement, under the post-office law, it is sufficiently certain to charge "that defendant was a person employed in one of the departments of the post-office establishment of the United States." *United States v. Patterson*, 6 McLean, 466.

32. When the embezzlement is of a letter containing a bank-note, it is not necessary to describe the note. *Ib.*

33. In larceny such description is necessary. *Ib.*

34. (July, 1855.) A count in an indictment which alleged that the defendant did secrete and embezzle a certain letter is not defective. *United States v. Sander*, 6 McLean, 598.

35. When a statute makes one or more distinct acts connected with the same transaction indictable, they may be charged as one act. *Ib.*

Indictment. Under Revenue Laws.

1. (Oct., 1877.) An indictment under sec. 3266 of the Revised Statutes, charging the defendant with causing or procuring some other person to use a still, boiler, or other vessel, for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States, is bad, unless it states the name of such other person, or avers that the same is unknown. *United States v. Simmons*, 6 Otto, 360.

2. An averment that such use was "in a certain building and on certain premises where vinegar was manufactured and produced" is not sufficient, as it does not state that vinegar was manufactured or produced there at the time the still and other vessels were used for the purpose of distilling. *Ib.*

3. It is not necessary to aver that the spirits distilled were alcoholic. The allegation that the vessels were used "for the purpose of distilling, within the intent and meaning of the internal revenue laws of the United States," sufficiently advises the accused of the nature of the offense charged. *Ib.*

4. The averment that the defendant caused and procured the stills and other vessels to be used implies, with sufficient certainty, that they were in fact used; and the nature of the means whereby their unlawful use was procured is matter of evidence to establish the imputed intent, and not of allegation in the indictment. *Ib.*

5. In an indictment under sec. 3281 of the Revised Statutes, charging that the defendant knowingly and unlawfully engaged in and carried on the business of a distiller, within the meaning of the internal revenue laws of the United States, with the intent to defraud the United States of the tax upon spirits distilled by him, it is not necessary to state the particular means by which the fraud was effected. The intent being charged, the means are matters of evidence for the consideration of the jury. *Ib.*

6. (April, 1875.) In an indictment founded on sec. 3397 of the Revised Statutes, which creates offenses in respect to cigars, it is not necessary to aver in the indictment an intent to defraud the United States. *United States v. Jacoby*, 12 Blatchf. 491.

7. Although sec. 3397 designates as felonies some of the offenses specified in it, and omits to designate others as felonies, offenses of each class, which arise out of one and the same transaction, may, under sec. 1024 of the Revised Statutes, be charged in one indictment, in different counts. *Ib.*

8. (Nov., 1875.) Sec. 4 of the act of July 18, 1866 (14 Stat. at Large, 179), reproduced in sec. 3082 of the Revised Statutes, provides that "if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise, after importation, knowing the same to have been imported contrary to law," "the offender shall be fined," &c. An indictment founded on this section described the merchandise as "certain goods, wares, and merchandise, to wit, a large quantity of silk goods, to wit, six cases containing silk goods, of the value of \$30,000, a more particular description of which is to the jurors unknown," and stated that the goods were dutiable goods introduced into the port of New York from France. *Held*, that the indictment was not open to the objection that the goods were not sufficiently identified, and the description of them not sufficient to enable the defendant to prepare his defense. *United States v. Claflin*, 13 Blatchf. 178.

9. It is not necessary to describe property in an indictment with such particularity as will obviate all necessity for proof outside the record to support a plea of once in jeopardy. *Ib.*

10. A reasonable amount of detail in describing property is all that is necessary in an indictment, and, if more detail is required, a bill of particulars may be demanded. *Ib.*

11. An indictment under the said section need not set out the offense committed in the original importation, with the same particularity of time, place, and circumstances that would be required in an indictment for the original offense. *Ib.*

12. The indictment having alleged that the illegality in the original importation of the goods was, that they had been "smuggled and clandestinely introduced into the United States," the charge must be confined to such illegality. *Ib.*

13. The averment that the goods were smuggled and clandestinely introduced into the port of New York from the Republic

of France is a sufficient averment to enable the court to say that the original importation was illegal, within the meaning of the statute. *Ib.*

14. The meaning of the word "smuggle" defined. *Ib.*

15. When technical words are used in an indictment, they must be taken to be intended to have their technical meaning. *Ib.*

16. In an indictment under the fourth section of the act of 1866, it is not a sufficient designation of the illegality of the original importation to say, merely, that the goods had been imported and brought into the United States contrary to law. *Ib.*

17. (Jan., 1877.) An indictment under sec. 3296 of the Revised Statutes, which charges a removal of a certain quantity of "distilled spirits" on which the tax had not been paid, to a place other than the distillery warehouse, is good. *United States v. Miller*, 14 Blatchf. 92.

18. (Dec., 1869.) The last clause of the seventy-eighth section of the act of Congress approved July 20, 1868, entitled an act imposing taxes on distilled spirits and tobacco (15 Stat. 159), contains no exception so incorporated in the body of the enactment that it must be negatived in an indictment founded on the clause. *United States v. Insand*, 1 Woods, 581.

19. (Dec., 1871.) The offenses of effecting an entry, and of aiding and assisting in effecting an entry, of goods, &c., at less than their true weight or measure, by means of false samples or false representations, &c., may be charged conjunctively in the same count of an indictment. *United States v. Bettilini*, 1 Woods, 654.

20. An indictment under sec. 3 of the act of March 3, 1863 (12 Stat. 739), charging the defendant with effecting an entry of goods by fraudulent means, must specify what fraudulent means were used, otherwise it is bad. *Ib.*

21. (March, 1878.) An indictment under sec. 3177 of the Revised Statutes, for hindering an internal revenue officer, without warrant, from entering a building where illicit distilled spirits, subject to tax, were kept, and from seizing said spirits, must aver that the attempt of the officer to enter, which was hindered, was made in the daytime, or that it was made in the night season when the premises were open, and that such entry was necessary for the purpose of examining such distilled spirits, and that they were in the custody of some person who had the purpose of sell-

ing or removing the same, in fraud of the internal revenue laws, or the design to avoid the payment of the taxes thereon. *United States v. Fears*, 3 Woods, 510.

22. (April, 1876.) Under sec. 3296 of the Revised Statutes of the United States, an allegation of the removal of spirits on which the tax had not been paid to a place other than the distillery warehouse, and the concealment thereof, is equivalent to alleging the concealment of spirits which have been removed, &c., and on which the tax had not been paid; and an indictment drawn as above is not bad for duplicity. *United States v. Nunnemacher*, 7 Biss. 129.

23. In drawing an indictment, it is not necessary that the exact words of the statute be used, if their precise equivalent is expressed; and the words "in execution and pursuance of" are equivalent in meaning to the words "to effect the object of." *Ib.*

24. Certainty to a common intent is sufficient. *Ib.*

25. The allegation that the tax on the spirits "had not been paid" is sufficient, without an allegation that it "was still due and owing." *Ib.*

26. (1875.) Requisites of indictment against distiller, for conspiracy to defraud the United States of the internal revenue tax, considered; and *held* not essential to state, in addition to an intent to defraud, the facts showing such intent. *United States v. Ulrici*, 3 Dill. 532.

27. Where the charge is of an *attempt* to defraud, the pleader should specify some acts which constitute the attempt. *Ib.*

28. A count for the removal of distilled spirits from the distillery to a place other than the distillery warehouse, *held* sufficient. *Ib.*

29. Under the legislation of Congress (Rev. Stat. s. 3224), an indictment for failing to efface, &c., marks and brands at the time of emptying the cask or package, need not aver a criminal intent. *Ib.*

30. So, as to a person having in his possession tax-paid stamps once used. In the cases last mentioned, Congress has not made criminal intent an element of the offenses. *Ib.*

31. (March, 1871.) An indictment which charges a defendant with carrying on the business of a retail liquor dealer, without payment of a special tax, at a certain place, continuously

between certain dates, is sufficient without stating the means or circumstances by which he became such retail dealer. *United States v. Howard*, 1 Sawyer, 507.

Indictment. Conspiracy.

1. (Oct., 1875.) The counts of an indictment which charge the defendants with having banded and conspired to injure, oppress, threaten, and intimidate citizens of the United States, of African descent, therein named; and which in substance respectively allege that the defendants intended thereby to hinder and prevent such citizens in the free exercise and enjoyment of rights and privileges granted and secured to them, in common with other good citizens, by the Constitution and laws of the United States; to hinder and prevent them in the free exercise of their right peacefully to assemble for lawful purposes; prevent and hinder them from bearing arms for lawful purposes; deprive them of their respective several lives and liberty of person without due process of law; prevent and hinder them in the free exercise and enjoyment of their several right to the full and equal benefit of the law; prevent and hinder them in the free exercise and enjoyment of their several and respective right to vote at any election to be thereafter by law had and held by the people in and of the State of Louisiana, or to put them in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted at an election theretofore had and held according to law, by the people of said state,—do not present a case within the sixth section of the Enforcement Act of May 31, 1870 (16 Stat. 141). To bring a case within the operation of that statute, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the Constitution or laws of the United States. If it does not so appear, the alleged offense is not indictable under any act of Congress. *United States v. Cruikshank*, 2 Otto, 543.

2. The counts of an indictment which, in general language, charge the defendant with an intent to hinder and prevent citizens of the United States, of African descent; therein named, in the free exercise and enjoyment of the rights, privileges, immunities, and protection, granted and secured to them respectively

as citizens of the United States and of the State of Louisiana, because they were persons of African descent, and with the intent to hinder and prevent them in the several and free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the Constitution and laws of the United States, do not specify any particular right, the enjoyment of which the conspirators intended to hinder or prevent, are too vague and general, lack the certainty and precision required by the established rules of criminal pleading, and are therefore not good and sufficient in law. *Ib.*

3. In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." The indictment must set forth the offense with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged; and every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading that, where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. The object of the indictment is,—first, to furnish the accused with such a description of the charge against him, as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances. *Ib.*

4. By the act under which this indictment was found, the crime is made to consist in the unlawful combination, with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court. The indictment should, therefore, state the particulars, to inform the court as well as the accused. It must appear

from the indictment, that the acts charged will, if proved, support a conviction for the offense alleged. *Ib.*

5. (Oct., 1870.) Conspiracy, as known at common law, not being defined by any act of Congress as an offense against the authority of the United States, is not cognizable as such in the federal courts. *United States v. Martin & Felton*, 4 Cliff. 156.

6. Two persons, one of whom was cashier of a national bank, and the other not an officer of any bank, were, under sec. 30 of the act of March 2, 1867, and sec. 55 of the act of June 3, 1864, indicted for conspiring together to abstract certain money from the bank. Demurrer to the indictment upon the ground that, under the act of June 3, 1864, the two could not be properly indicted for a conspiracy to commit an offense which, under the act of March 2, 1867, could only be committed by one, to wit, the bank officer. *Held*, that, under the act of March 2, 1867, it is an offense for an officer of such an association to conspire with another not an officer to abstract or embezzle the funds thereof, and that the indictment charging such two persons with a conspiracy to commit such offense was good. *Ib.*

7. (June, 1873.) An indictment for a violation of the thirtieth section of the act of March 2, 1867 (14 Stat. at Large, 484), which provides "that, if two or more persons conspire either to commit an offense against the laws of the United States, or to defraud the United States in any manner whatever, and one or more of said parties to said conspiracy shall do any act to effect the object thereof, the parties to said conspiracy shall be deemed guilty of a misdemeanor," is sufficient, if it correctly charges an unlawful combination as actually made, and, in addition, describes any act, by any one of the parties to the unlawful agreement, as an act intended to be relied upon to show the agreement in operation, although it does not appear by the face of the indictment in what manner the act described would tend to effect the object of the conspiracy. *United States v. Donau*, 11 Blatchf. 168.

8. (Feb., 1879.) An indictment for a violation of sec. 5440 of the Revised Statutes of the United States charged that the defendants conspired to commit an offense against the United States, — that is, to willfully conceal and destroy certain papers relating to certain merchandise called dress trimmings, liable to duty, which had been theretofore imported and brought into the United States and the port of New York from a foreign port, by A., for

the purpose of suppressing certain evidence of fraud therein contained, describing the papers and averring that they contained statements from the consignors of A., addressed to and received by him in the due course of his business, showing that said merchandise had been knowingly and fraudulently entered and passed through the custom-house at New York, on a false classification thereof as to value, and by the payment of less than the duty legally due to the United States, and which papers were material and important evidence for the United States in any proceeding because of said fraudulent entry, and alleging various acts charged to have been done to effect the object of the conspiracy. On a motion to quash the indictment, it was objected that it was bad for uncertainty, because it omitted to state facts showing the commission of a fraud upon the United States in connection with the importation of the merchandise, and because the contents of the papers were not so stated as to enable the court to see that they contained evidence of that fraud. *Held*, that the indictment was sufficient. *United States v. De Grieff*, 16 Blatchf. 20.

9. (Jan., 1878.) If an indictment founded upon sec. 5440 of the Revised Statutes of the United States charges a conspiracy by two or more persons, but is an indictment of one only of such persons, it is good on demurrer. *United States v. Miller*, 3 Hughes, 553.

10. (April, 1877.) An indictment for a conspiracy to do an unlawful act need not aver the means agreed on whereby the conspiracy was to be carried into effect. *United States v. Dennee*, 3 Woods, 47.

11. An indictment for conspiracy under sec. 5440, Revised Statutes, which avers the conspiracy and overt acts done to carry it into effect, is sufficient, without stating the means agreed on to accomplish the purpose of the conspiracy. *Id.*

12. (Nov., 1878.) An indictment based on sec. 5520 of the Revised Statutes, for conspiracy to prevent by force, &c., a citizen lawfully authorized to vote from giving his support and advocacy in a legal manner in favor of the election of a lawfully qualified person as a member of Congress, need not set out the acts of advocacy and support which the conspiracy was formed to prevent. *United States v. Goldman*, 3 Woods, 187.

13. (Oct., 1869.) In an indictment for a conspiracy to defraud the United States, under sec. 30 of the act of March 2, 1867, alleging the conspiracy to have been entered into in the county

of Champaign, within the Southern District of Ohio, if the proof shows that, if there was a conspiracy, it was entered into in the county of Montgomery, it is not a fatal variance between the allegation of the indictment and the proof, the act charged being averred to have been committed within the territorial limits of the Southern District of Ohio, and therefore within the jurisdiction of the court. *United States v. Smith*, 2 Bond, 323.

14. It was not necessary to set forth the county in which the alleged conspiracy was formed, and it may be rejected as surplusage. *Ib.*

15. (Oct., 1869.) In an indictment based upon sec. 30 of the act of March 2, 1867, charging a conspiracy to defraud the United States of the taxes due upon distilled spirits, it is not necessary to allege the specific mode agreed upon by which the object of the conspiracy was to be carried out. *United States v. Dustin*, 2 Bond, 332.

16. It is sufficient, in an indictment under this law, to aver that there was a conspiracy to defraud the United States of taxes legally due, and that, in pursuance of such conspiracy, the defendants committed a stated overt act. *Ib.*

17. Allegations of the overt act are not required to be as full and minute in an indictment for conspiracy as in an indictment for fraud without any conspiracy. *Ib.*

18. If an overt act, in violation of law, is charged as in pursuance of a previous conspiracy, it is sufficient. *Ib.*

19. One good count in an indictment will sustain a general verdict of guilty, and though there may be different counts, it will afford no reason for quashing the whole indictment. *Ib.*

20. (1875.) Under the legislation of Congress, an officer of the internal revenue, named as such in the indictment, cannot be jointly indicted for a conspiracy to defraud the revenue, with private persons. *United States v. McDonald et al.*, 3 Dill. 543.

21. The doctrine of *merger* does not apply to misdemeanors; and the present indictment held good though it charged a completed offense in addition to a conspiracy to commit it. *Ib.*

22. (1876.) Form of indictment for conspiracy to defraud the revenue. *United States v. Babcock*, 3 Dill. 623.

23. (1878.) The Revised Statutes (sec. 5440), in respect of the crime of conspiracy to defraud the United States, change, in material respects, the offense of conspiracy as it existed at com-

mon law; and every ingredient of the offense must be clearly alleged. *United States v. Walsh*, 5 Dill. 58.

24. An indictment charging an alleged conspiracy to defraud the United States to consist in "certifying that certain false and fraudulent accounts and vouchers for materials furnished for use in the construction of the United States custom-house and post-office in the city of St. Louis, and for labor performed on the said building, were true and correct," is bad for uncertainty. *Ib.*

Indictment. Trespass on Public Lands.

1. (Oct., 1852.) Under the act of Congress, it is not necessary to describe in an indictment for trespass on the public lands every kind of timber that was cut. *United States v. Redy*, 5 McLean, 358.

2. It is sufficient to name one or more species, and in the words of the statute allege other timbers. *Ib.*

3. An indictment will lie for cutting timber on any of the public lands, though it may not have been reserved for naval purposes. *Ib.*

4. (June, 1853.) The indictment charged the defendant with being employed in "removing from lands of the United States, at the mouth of the river Muskegon, in the county of Ottawa, and district of Michigan, a large amount of timber, to wit, one hundred thousand shingles and twenty cords of shingle bolts." The court held this description too vague and uncertain. *United States v. Schuler*, 6 McLean, 28.

5. (Oct., 1853.) It is not necessary, in an indictment for cutting timber, to state the class of lands from which the trees were cut. *United States v. Thompson*, 6 McLean, 56.

6. Such a description as shows the accused the offense with which he is charged is sufficient. *Ib.*

7. Where a statute creates an offense, and the indictment charges the same in the precise words of the statute, it is unnecessary to prefix to the charging words the word "unlawful," or any other word showing a wrongful intention. *Ib.*

8. (Oct., 1854.) It is not charging an offense in the alternative, where the language describes the same offense. Cutting, or causing to be cut, is one offense by the statute of 1831. *United States v. Potter*, 6 McLean, 186.

Indictment. Under Registration Laws.

1. (Nov., 1870.) The averments in the indictment in this case, as to the existence and action of the Board of Inspectors of Registry, upheld as sufficient, on demurrer, the court taking judicial notice of the statutes of New York in respect to such board, such statutes being referred to in the indictment. *United States v. Quinn*, 8 Blatchf. 48.

2. (April, 1876.) An indictment under sec. 5512 of the Revised Statutes, for fraudulent registration, alleged, in one count, that the defendant, "having no lawful right to register, fraudulently and wilfully did register," and in another count, "that he had no lawful right to register, as he well knew, by reason of the fact that he was then and there an alien, and had not been admitted to become a citizen of the United States." *Held*, that the indictment was bad, in not pointing out the fraud, and in omitting to state facts showing that the defendant was not entitled to register; and that the averment that the accused was an alien and had not been admitted to become a citizen of the United States, did not show that he had no right to register, or that he was not a citizen of the United States, or that he had no right to vote. *United States v. Hirschfield*, 13 Blatchf. 330.

3. (Dec., 1876.) An indictment will not lie, in a United States court in New York, against a person for having fraudulently registered at a registry of voters in New York, for an election for representatives in Congress, when he was disqualified as a voter by reason of having been convicted of a felony, where the conviction set forth is for having committed the offense created by sec. 5431 of the Revised Statutes of the United States, of uttering a counterfeited security of the United States. *United States v. Barnabo*, 14 Blatchf. 74.

Indictment. Resisting an Officer.

1. (May, 1814.) What is a sufficient allegation of a *forcible* impeding, within the act of 2d of March, 1799, ch. 128, s. 71. *United States v. Bachelder*, 2 Gall. 15.

2. In an indictment for a statute offense, it is sufficient if the offense is substantially set forth, though not in the exact words of the statute. *Ib.*

3. It is not necessary, in an indictment for resisting a public officer, to set forth the particular exercise of office in which he was engaged, or the particular act and circumstances of obstruction. *Ib.*

4. (Oct., 1854.) An indictment under the twenty-second section of the act of April 30, 1790 (1 Stat. at Large, 117), must show by proper averments that the process was legal. *United States v. Stowell*, 2 Curt. C. C. 153.

5. A commissioner empowered to issue a warrant, under the statute of the United States of Sept. 18, 1850 (9 Stat. at Large, 462), must be such a commissioner as is particularly described in that act; and, consequently, an averment in an indictment for resisting such a warrant, that it was issued by a commissioner of the Circuit Court of the United States, is not sufficient. *Ib.*

6. An averment that a warrant was duly issued is insufficient; the facts constituting the due issue must be set forth. *Ib.*

7. The want of an averment of the facts showing that the commissioner was authorized to issue the warrant cannot be aided by referring to the records of this court. *Ib.*

8. (Jan., 1856.) What an indictment for such an offense [under sec. 22 of the act of April 30, 1790 (1 Stat. at Large, 117)] must allege, considered. *United States v. Tinklepaugh*, 3 Blatchf. 425.

9. Where an indictment for such offense showed that the process resisted was a warrant of attachment issued by the District Court against a vessel, on the filing, by the district attorney, of a libel for a forfeiture of the vessel, — *Held*, that it was not necessary for the indictment to show what averments the libel contained. *Ib.*

Indictment. Nuisance.

1. (Dec., 1851.) An indictment against a bridge as a nuisance, by the United States, could not be sustained. *Pennsylvania v. Wheeling, &c. Bridge Co.*, 13 How. 519.

Indictment. Issuing Obligation to circulate as Money.

1. (Oct., 1877.) Under the second section of the act of Congress approved July 17, 1862 (12 Stat. 592), which declares that “no private corporation, banking association, firm, or individual

shall make, issue, circulate, or pay out any note, check, memorandum, token, or other obligation for a less sum than one dollar, intended to circulate as money, or to be received or used in lieu of lawful money of the United States," A. was indicted for circulating obligations in the following form : —

"BANGOR, MICH., Aug. 15, 1874.

"The Bangor Furnace Company will pay the bearer, on demand, fifty cents, in goods, at their store, in Bangor, Mich.

(Signed)

"A. B. HOUGH, *Pres.*

"CHAS. D. RHODER, *Treas.*"

The indictment charged that he intended them to circulate as money, and to be received and used in lieu of lawful money of the United States. *Held*, that as the obligations were payable in goods and not in money, and the sum of fifty cents was named merely as the limit of the value of the goods demandable, the indictment was bad on demurrer. *United States v. Van Auken*, 6 Otto, 366.

Information. Misdemeanor:

1. (May, 1816.) In an information on the fiftieth section of the Collection Act of 1799, ch. 128, it is necessary to allege that the goods were unladen in some port or place within a collection district, without a permit from the collector of the port or district. But it will be sufficient, if the fact be so, to allege the port or district to be to the attorney unknown. *United States v. Burnham*, 1 Mason, 57.

2. Material matter, although alleged under a *videlicet*, is traversable, and must be proved as laid. Of the nature and office of a *videlicet*. Where immaterial matter may be rejected as surplusage, or not. *Ib.*

3. (Dec., 1876.) A motion being made to quash an indictment for a misdemeanor, an information was filed setting forth the same charge as that in the indictment, accompanied with an affidavit as to the identity of the offense. A *nolle prosequi* was entered on the indictment, and the defendant moved to quash the information, on the ground that there had been no preliminary examination before a commissioner, nor any order to show cause.

Held, that the motion must be denied. *United States v. Ronzone*, 14 Blatchf. 69.

4. (Feb., 1879.) It is not necessary that a criminal information should show either that the defendant has been held to answer the charge, on a complaint before a commissioner, or that the charge has been found true by a grand jury. *United States v. Moller*, 16 Blatchf. 65.

5. A criminal information for a violation of sec. 5445 of the Revised Statutes of the United States, in effecting an entry of merchandise, need not set forth the various steps or documents by which the entry was accomplished, so long as the information is otherwise sufficient. *Ib.*

6. The question whether a criminal prosecution for the acts complained of will lie after the recovery of a penalty by a civil suit for the same acts, does not arise on a demurrer to the information. *Ib.*

7. (Nov., 1879.) The fact that an indictment against a person has been quashed because of insufficient averments, is no ground for quashing an information subsequently filed by the district attorney against the same person for the same offense. *United States v. Nagle*, 17 Blatchf. 258.

8. It is no objection to an information filed in open court by the sworn assistant of the district attorney that the signature of the district attorney to the information was written by such assistant by virtue of a general authority conferred upon him by the district attorney. *Ib.*

9. (1875). Offenses, "not capital or otherwise infamous," may, by leave of court, upon complaint on oath, be prosecuted in the federal courts by criminal information. *United States v. Maxwell*, 3 Dill. 275.

10. (Oct., 1879.) An information charging an attorney with inciting and encouraging his clients, who were parties in a pending litigation, to influence improperly the judicial action of the court in such litigation, by newspaper publications and printed circulars, disparaging the judicial conduct of the court, with intent to intimidate the judges in their action, *held* good on demurrer. *Ex parte Cole*, 1 McCrary, 406.

11. In such an information, the precise mode by which the attorney conveyed suggestions to his client, whether by letter, direct oral conversation, or by a message sent through a third person, need not be stated. *Ib.*

12. It is not necessary, in such an information, to aver that the publications suggested by the attorney were in fact made by the client. The offense is complete when the suggestion is made in earnest to a party likely to act on it. *Ib.*

13. Such an information is not to be held bad on demurrer, upon the ground that the suggestion, being one made to a client concerning a matter in suit, is a privileged communication. *Ib.*

14. An allegation in an information against an attorney, that when the appointment of two different persons at different times, as receiver of a railroad, was under consideration, he endeavored to secure from them, as a condition to his consent to their appointment, a secret promise that each of them would, if made receiver, appoint one Pickering general manager of the road, and one Atherton to some other place in its business, — *Held* insufficient to warrant disbarment, in the absence of an allegation that the persons named were unfit, or that the pledge was not sought in the interest of his client. *Ib.*

15. (Aug., 1871.) Misdemeanors may be prosecuted in the national courts, by information. *United States v. Waller*, 1 Sawyer, 701.

Pleas. Criminal Cases.

1. (Jan., 1846.) The twenty-fifth section of the act of 30th June, 1834, extends the laws of the United States over the Indian country, with a proviso that they shall not include punishment for "crimes committed by one Indian against the person or property of another Indian."

This exception does not embrace the case of a white man who, at mature age, is adopted into an Indian tribe. He is not an "Indian," within the meaning of the law. *United States v. Rogers*, 4 How. 567.

2. It results from these principles that a plea, set up by a white man, alleging that he had been adopted by an Indian tribe, and was not subject to the jurisdiction of the Circuit Court of the United States, is not valid. *Ib.*

3. (Dec., 1854.) The act of Congress passed on the 29th July, 1813 (3 Stat. at Large, 49), enacts that the owner of every fishing-vessel shall, previous to receiving the allowance mentioned in the act, produce to the collector the original agreement which may have been made with the fishermen, and also a certified copy

of the days of sailing and returning, to the truth of which he shall swear before the collector.

These latter words include the first branch, as well as the second branch of the sentence ; so that the owner must not only swear to the truth of the certificate, but also to the verity of the agreement with the fishermen. *United States v. Nickerson*, 17 How. 204.

4. A person was indicted in the District Court of Massachusetts, for perjury, in swearing falsely to the agreement with the fishermen, and in swearing falsely, that three-fourths of the crew were citizens of the United States. As the district judge held that the act of Congress only required the owner to swear to the certificate of sailing, and not to the agreement with the fishermen, the person was acquitted. *Ib.*

5. Afterwards, when indicted in the Circuit Court, this person pleaded his former acquittal. This was a good plea ; because the evidence necessary to sustain the indictment, with respect to the fishermen's agreement, might have been given by the United States in the first trial. *Ib.*

6. With respect to the oath that three-fourths of the crew were citizens of the United States, the act of 1813 did not require that oath ; but then the indictment did not purport to bring the offense under that act, but referred to the statutes of the United States generally. *Ib.*

7. (Oct., 1878.) The district attorney has no authority to contract that a person accused of an offense against the United States shall not be prosecuted or his property subjected to condemnation therefor, if, when examined as a witness against his accomplices, he discloses fully and fairly his and their guilt. *Whiskey Cases*, 9 Otto, 594.

8. A person so accused cannot plead the contract in bar of proceedings against him or his property, nor avail himself of it upon the trial, but has merely an equitable title to executive mercy, of which the court can take notice only when an application to postpone the case is made, in order to give him an opportunity to apply to the pardoning power. *Ib.*

9. (Oct., 1851.) It is not a good plea, in bar to an indictment for a misdemeanor, that the case was once committed to a jury, and withdrawn before verdict, by order of the court. *United States v. Morris*, 1 Curt. C. C. 23.

10. (Oct., 1853.) Under what circumstances a person indicted for a misdemeanor may plead by attorney. *United States v. Mayo*, 1 Curt. C. C. 433.

11. (Oct., 1861.) A nation at war may commission private armed vessels to carry on war against its enemy on the high seas, and the commission will afford protection, even in the judicial tribunals of the enemy, against a charge of the crime of robbery or piracy. *United States v. Baker*, 5 Blatchf. 6.

12. Such a commission would be a good defense against an indictment under the third section of the act of May 15, 1820 (3 Stat. at Large, 600). *Ib.*

13. The ninth section of the act of April 30, 1790 (1 Stat. at Large, 114), changes that rule, as it respects citizens of the United States who take service under a commission to a private armed vessel from the enemy of their country. *Ib.*

14. (Jan., 1871.) The defendant was indicted for bribing an officer of the United States. He pleaded that he was brought into the jurisdiction of the court on a charge of forgery, under an extradition treaty, and that such offense of bribery was not within the treaty. On demurrer to the plea, — *Held*, that the plea was bad. *United States v. Caldwell*, 8 Blatchf. 131.

15. (Oct., 1876.) A plea in abatement to an indictment averred that forty-eight persons were summoned as grand jurors; that the names of such persons were not drawn by the clerks, as required by the rules; that one of the grand jurors was a non-resident; and that several of them were not possessed of the proper property qualification. It did not aver any prejudice to the accused. On demurrer to the plea, — *Held*, that the plea was bad. *United States v. Tuska*, 14 Blatchf. 5.

16. (Nov., 1875.) Where a party indicted was neither in custody nor under bond when the grand jury which indicted him was impanelled, and had no chance to challenge the grand jurors, he may take advantage of the disqualification of any one or more of them, by plea in abatement. *United States v. Hammond*, 2 Woods, 197.

17. A plea in abatement alleging such disqualification will not be favored, but should contain all essential averments, pleaded with exactness. *Ib.*

18. A plea in abatement which alleged, as a disqualification of a grand juror, that he "did take up arms and join the insurrec-

tion or rebellion against the United States, and adhered to, said insurrection or rebellion, giving it aid and comfort," but without any specific averment of time or place, is uncertain and bad. *Ib.*

19. The proper conclusion of a plea in abatement is a prayer that the indictment be quashed. *Ib.*

20. When a plea in abatement prays for a judgment which the court cannot give upon a plea in abatement, the plea is defective and bad. *Ib.*

21. A plea in abatement, alleging a disqualification of one of the grand jurors who found the indictment, need not be verified. *Ib.*

22. (July, 1843.) The rules of pleading are the same in civil and criminal cases. *United States v. Brown*, 3 McLean, 233.

23. (Feb., 1871.) To an information against a brewer, filed under the forty-eighth, forty-ninth, fifty-first, and fifty-third sections of the act of July 13, 1866, it is not a sufficient answer that the neglect to keep the prescribed books and accounts was through ignorance or carelessness, and that there was no wrongful or criminal intent. *United States v. Foster*, 2 Biss. 453.

24. Nor is it a sufficient answer or excuse, that he misconstrued the law, and drew erroneous inferences as to his rights. *Ib.*

25. (1871.) Pleas in abatement to an indictment are dilatory pleas; and not being favored, the law requires that they shall be pleaded with strict exactness. *United States v. Williams*, 1 Dill. 485.

26. A plea in abatement construed to mean that the indictment should not be further prosecuted, because an interested person caused himself and others to be nominated and placed upon the grand jury which found the bill. *Ib.*

27. Whether such a plea is good, *quære*. Authorities cited. *Ib.*

28. Upon the verdict of a jury against a plea in abatement to an indictment, judgment was entered overruling the plea, and allowing the defendant to plead not guilty. *Ib.*

Commitment.

1. (Feb., 1807.) A person may be committed for a crime, by one magistrate, upon an affidavit made before another. *Ex parte Bollman*, 4 Cranch, 75.

2. *Quære*: Whether, upon a motion to commit a person for treason, an affidavit stating the substance of a letter in possession of the affiant be admissible evidence. *Ib.*

3. (Oct., 1851.) The practice prescribed for the commitment of prisoners by the marshal, to the custody of the jails of the state, and for bringing them up for trial or other cause, after such commitment. *Anonymous*, 1 Blatchf. 648.

4. The *mittimus* and the *habeas corpus*, in such cases, discussed. *Ib.*

5. (July, 1859.) A commitment of a prisoner by a commissioner, on a preliminary warrant, for examination, should be for a short fixed period of time, and not for an indefinite time. *United States v. Worms*, 4 Blatchf. 332.

6. The time should not exceed twenty-four hours, except for special cause shown, unless requested by the prisoner. *Ib.*

7. The government should be held to diligence in producing their testimony, or the prisoner should be discharged. *Ib.*

Grand Jury.

1. (Oct., 1878.) Sec. 808 of the Revised Statutes, providing for impanelling grand juries and prescribing the number of which they shall consist, applies only to the Circuit and District Courts of the United States. An indictment for bigamy under sec. 5352 may, therefore, be found in a District Court of Utah, by a grand jury of fifteen persons, impanelled pursuant to the laws of that territory. *Reynolds v. United States*, 8 Otto, 145.

2. (Oct., 1852.) It is the uniform practice, in the federal and state courts, for the clerk and assistant of the district attorney to attend the grand jury and assist in investigating the accusations presented before them. That practice must be regarded as settled; but any abuse or improper conduct on the part of any person admitted to the grand jury will be investigated by the court. *United States v. Reed*, 2 Blatchf. 436.

Bail.

1. (Dec., 1869.) Accordingly, when in a criminal action a stipulation was made, and entered in the minutes of the court, between the government and the defendant, who had given bail

for his appearance for trial, that he might depart without the territory of the United States to a foreign country, and remain there until certain civil cases pending in another court were finally disposed of, and such stipulation was made without the knowledge or assent of the sureties on the recognizance of bail, — *Held*, that the sureties were released. *Reese v. United States*, 9 Wall. 13.

2. (Dec., 1869.) In such a case [of setting aside a judgment of conviction on confession] the original indictment is still pending; and a bail-bond given after this, for the prisoner's appearance from day to day, is valid: *Basset v. United States*, 9 Wall. 38.

3. (Feb., 1871.) A commissioner appointed by a Circuit Court of the United States for a district within the State of New York, has no power to take a recognizance for the appearance before himself, at a future day, of a person charged with a criminal offense against the laws of the United States, and a recognizance so taken is void. *United States v. Case*, 8 Blatchf. 250.

District Attorney.

1. (Oct., 1878.) The district attorney has no authority to contract that a person accused of an offense against the United States shall not be prosecuted, or his property subjected to condemnation therefor, if, when examined as a witness against his accomplices, he discloses fully and fairly his and their guilt. *Whiskey Cases*, 9 Otto, 594.

2. (Oct., 1854.) The district attorney has power, under the control of the court, at any time before a jury is impanelled, to enter a *nolle prosequi*. *United States v. Stowell*, 2 Curt. C. C. 153.

3. (Jan., 1860.) Where a grand jury was impanelled and sworn during the lifetime of a district attorney, and was charged by the court to inquire into the cases of all persons imprisoned for criminal offenses against the laws of the United States, and then the district attorney died, and afterwards the prisoner was examined and committed by a commissioner, and an indictment was found against him while the office of district attorney was vacant, — *Held*, that the grand jury was empowered to take cognizance of the case. *United States v. McAvoy*, 4 Blatchf. 418.

4. The indictment not having been signed by any district attorney, and a new district attorney having caused the prisoner

to be arraigned and tried on the indictment,—*Held*, that such action of the new district attorney was full evidence to the court of his concurrence in the action of the grand jury, and of his prosecution of the prisoner in the name of the United States, pursuant to the directions of the statute. *Ib.*

5. The signature of a district attorney is no part of an indictment, and is only necessary as evidence to the court that he is prosecuting the offender conformably to the duty imposed on him by statute. *Ib.*

6. No power is conferred, by statute or usage, on the courts of the United States to recognize a suit, civil or criminal, as legally before them, in the name of the United States, unless it is instituted and prosecuted by a district attorney legally appointed and commissioned conformably to the statute. *Ib.*

7. (June, 1840.) The prosecuting attorney has a right, with leave of the court, to enter a *nolle prosequi* on a bill of indictment, and it constitutes no bar to a subsequent indictment for the same offense. *United States v. Shoemaker*, 2 McLean, 114.

8. A jury sworn in a criminal case may be discharged by the court under any sudden and uncontrollable emergency; and such discharge is no bar, even in a capital case, to another trial. *Ib.*

9. But after the jury are impanelled and witnesses sworn, the prosecuting attorney has no right to enter a *nolle prosequi* because the evidence is not sufficient to convict. Such an abandonment by the prosecuting attorney is equivalent to a verdict of acquittal. *Ib.*

Remitting Criminal Case to another Court.

1. (Dec., 1865.) Under the second section of the act of 8th August, 1840, "to regulate the proceedings in the Circuit and District Courts," and which, after authorizing the transfer of criminal causes from either court to the other, on motion of the district attorney, says that "the court to which such remission is made shall, after the order of remission is filed therein, act and proceed in the case as if the indictment and all the other proceedings in the same had been originated in said court," an indictment may be remitted from the District Court to the Circuit Court, though it have come into the District Court originally only by being sent there from the Circuit Court. And a demurrer to the indictment made in the District Court may properly receive

a joinder in the Circuit Court. *United States v. Murphy*, 3 Wall. 649.

2. (Oct., 1851.) Under the act of Congress of Aug. 8, 1846 (9 Stat. at Large, 73, s. 3), an indictment for a misdemeanor may be remitted to this court [from the District Court] by an order made at a term subsequent to that to which the indictment is returned, and after the defendant has pleaded, and some proceedings have been had. *United States v. Morris*, 1 Curt. C. C. 23.

3. (May, 1879.) There is no provision of law whereby an indictment found in a Circuit Court can be remitted by it to the District Court, unless the district attorney deems it necessary. *United States v. Bennett*, 16 Blatchf. 338.

Motion to quash Indictment.

1. (Oct., 1854.) It is within the discretion of the court to entertain a motion to quash an indictment or to hold the defendant to plead in abatement, or demur. *United States v. Stowell*, 2 Curt. C. C. 153.

2. (May, 1855.) A defect pleadable only in abatement is not ground for quashing an indictment. *United States v. Pond*, 2 Curt. C. C. 265.

3. (Oct., 1869.) A motion to quash will not be sustained unless the indictment is bad beyond a reasonable doubt. *United States v. Dustin*, 2 Bond, 332.

4. It is the practice in the courts of the United States, where an indictment has been quashed, to hold the defendant in custody to answer to a new indictment. *Id.*

5. (July, 1855.) Two objections were taken to the indictment:—

1st. That the grand jury were illegally selected.

2d. That during the whole time in which the grand jury were deliberating and considering upon the bill of indictment one of the grand jurors was absent, and did not consider upon, consent to, or have knowledge of, the action of the grand jury; that the indictment was found and returned into court by fourteen grand jurors.

The court, in an elaborate and able opinion delivered by Judge Wilson, overruled the motion to quash, and sustained the indictment. *United States v. Wilson*, 6 McLean, 604.

Jury. In Criminal Trials.

1. (April, 1795.) But the whole panel having been eventually drawn out of the balloting box, without furnishing twelve names unchallenged, and those jurors persevering in their excuse, the counsel for the prisoner retracted his challenge of another juror, who was thereupon qualified, by order of the court. *United States v. Porter*, 2 Dall. 345.

2. (April, 1806.) On an indictment under the act of Congress of 26th March, 1804, for casting away and destroying a vessel, of which the defendant was the owner, to the prejudice of the underwriters, the accused has the right of peremptory challenge, as at common law, on a capital charge. *United States v. Johns*, 4 Dall. 382.

3. (Feb., 1824.) The discharge of the jury from giving a verdict in a capital case, without the consent of the prisoner, the jury being unable to agree, is not a bar to a subsequent trial for the same offense. *United States v. Perez*, 9 Wheat. 579.

4. The court is invested with the discretionary authority of discharging the jury from giving any verdict in cases of this nature, whenever, in their opinion, there is a manifest necessity for such an act, or the ends of public justice would otherwise be defeated. *Ib.*

5. (Oct., 1878.) A petit juror in a criminal case testified on his *voire dire* that he believed that he had formed an opinion, although not upon evidence produced in court, as to the guilt or innocence of the prisoner; but that he had not expressed it, and did not think that it would influence his verdict. He was thereupon challenged by the prisoner for cause. The court overruled the challenge. *Held*, that its action was not erroneous. *Reynolds v. United States*, 8 Otto, 145.

6. (Oct., 1852.) The Judiciary Act of Sept. 24, 1789 (1 Stat. at Large, 88, s. 29), the act of May 13, 1800 (2 id. 82), and the act of July 20, 1840 (5 id. 394), adopt the state regulations respecting the procurement of grand and petit jurors to serve in the federal courts, and apply to those courts the state regulations respecting the qualifications and the exemptions of grand and petit jurors. *United States v. Reed*, 2 Blatchf. 435.¹

¹ Various questions are discussed in this case, with regard to the summoning of the grand jury, and the proceedings before it.

7. But peremptory challenges in criminal cases, in the federal courts, are regulated by the common law. *Ib.*

8. (Nov., 1852.) Peremptory challenges to jurors are not allowed in the courts of the United States in any other than capital cases, even though they are allowed in other cases by the state law. *United States v. Cottingham*, 2 Blatchf. 470.

9. (Feb., 1864.) Where a jury was impanelled and sworn, to try an indictment, before the defendant had been arraigned or had pleaded to the indictment, and that jury was dismissed, and, after the defendant had pleaded, a new jury was impanelled and sworn, by whom the indictment was tried, and the defendant was convicted, — *Held*, that the defendant was not twice put in jeopardy by the proceeding. *United States v. Riley*, 5 Blatchf. 204.

10. In the courts of the United States the jury are not the judges of the law in a criminal case. *Ib.*

11. (March, 1876.) Sec. 804 of the Revised Statutes provides that, when the panel is exhausted, the marshal, by the order of the court, shall return jurymen from the bystanders, sufficient to complete the panel. Under such an order, the marshal summoned as jurymen persons who were not in the court-room or about the court-house when such order was made, or when they were summoned, but they were present in court when they were returned by the marshal as present, and when their names were placed on the panel and their ballots placed in the wheel. *Held*, that they became bystanders, within the meaning of the statute, when they attended.

Held, also, that such objection should have been taken as a ground of challenge to the array, before the polls were drawn, and that it was too late to challenge the array after challenging the polls. *United States v. Loughery*, 13 Blatchf. 267.

Witnesses for Prisoner.

1. (May, 1801.) A party charged with a crime, even before indictment found, may have compulsory process for his witnesses; but his omitting to use it is not such negligence as will deprive him of a continuance, if his witnesses be absent, though it will justify the court in imposing terms upon him. *United States v. Moore*, Wall. C. C. 23.¹

¹ Second edition.

2. (April, 1870.) It is the duty of the court, on application of the prisoner, showing that he is unable to send for his witnesses, to summon them at the expense of the government. *United States v. Kenneally*, 5 Biss. 122.

Evidence in Criminal Cases.

1. (April, 1795.) . . . Unless an opportunity were afterwards given to investigate the characters and trace the conduct of the witnesses, it would be nugatory and delusive to furnish the list of their names. The act directs notice to be given; this must be intended for the purpose alluded to, and for the attainment of that purpose time is undoubtedly necessary.

It must therefore be considered as a rule in this case, and in all other cases of a similar nature, that a reasonable time shall be allowed, after a list of the names of the witnesses is furnished to the prisoners, for the purpose of bringing testimony from the counties in which those witnesses live. *United States v. Stewart & Wright*, 2 Dall. 344.

2. (April, 1795.) If it can be proved that the copy of the letter now produced was one of those copies which were actually circulated at the time of the insurrection, it is admissible evidence; but otherwise it cannot be read to the jury. *United States v. Mitchell*, 2 Dall. 357.

3. An act committed with a felonious intention cannot be given in evidence upon the trial of an indictment for high treason. It does not yet appear that the mail was intercepted and rifled with a traitorous intention; and, as far as it respects the prisoner, there is another indictment against him, charging the offense merely as a felony. Under these circumstances the testimony cannot be admitted. *Id.*

4. (April, 1798.) The letter appears by its date to have been written in Pennsylvania, and it is actually delivered by the defendant at a post-office in Pennsylvania. The writing and the delivery at the post-office (thus putting it in the way to be delivered to Mr. Coxe) must be considered, in effect, as one act; and, as far as respects the defendant, it is consummated within the jurisdiction of the court. We therefore think that the first count in the indictment is sufficiently supported. But on the second count there can be no possible doubt, if the testimony is credited.

The defendant, in the city of Philadelphia, unequivocally repeats, in words, the corrupt offer which he had previously made to Mr. Coxe in writing. *United States v. Worrall*, 2 Dall. 388.

5. (Jan., 1827.) In criminal proceedings, the *onus probandi* rests upon the prosecutor, unless a different provision is expressly made by statute. *United States v. Gooding*, 12 Wheat. 471.

6. (May, 1830.) It is no defense to an indictment for forcibly obstructing or impeding an officer of the customs in the discharge of his duties that the object of the party was personal chastisement, and not to obstruct or impede the officer in the discharge of his duties, if he knew the officer to be so engaged. *United States v. Keen*, 5 Mason, 453.

7. (March, 1860.) On the trial of an indictment for an endeavor to make a revolt on board of an American vessel in a foreign port, under the second section of the act of March 3, 1835 (4 Stat. at Large, 776), it is not necessary to give documentary proof establishing the national character of the vessel, but it is sufficient to prove orally that she is owned by an American citizen. *United States v. Seagrist*, 4 Blatchf. 420.

8. (May, 1879.) The district attorney having, at the trial, marked the particular portions of the book which he claimed to be within the statute [against depositing obscene books, &c., in the mails], and having stated that he did not rely on any others, the court properly refused to permit the counsel for the defendant to read to the jury any portions of the book except the parts so marked, unless they were in immediate connection, to qualify the parts so marked. The marked parts and the contexts of the same were read to the jury and commented on by the defendant's counsel in his summing up, and each one of the jurors had a copy of the book in his hand during the reading and took the same with him. *United States v. Bennett*, 16 Blatchf. 338.

9. The court properly refused to permit the defendant's counsel to read from other books clauses of alleged similar character, by way of illustration. *Ib.*

10. (March, 1875.) In all criminal cases in which there has been no preliminary examination, it is within the discretion of the court to order a list of the witnesses sworn before the grand jury, to be furnished to the accused. *United States v. Southmayd*, 6 Biss. 321.

11. He is not, however, entitled to the minutes of the proceedings before the grand jury, nor, in the absence of strong reasons to the contrary, should they be furnished him. *Id.*

Continuance.

1. (April, 1795.) BY THE COURT: We have no hesitation in granting the indulgence of a delay for a few days. The cause may therefore be continued till this day week; and in the mean time let the attachment issue; but it can only be in the case in which the subpoena has been actually served. The practice must always be strict in the previous stages of the business, before an attachment can be awarded; and all the documents, upon which it is awarded, must be filed with the court. *United States v. Caldwell*, 2 Dall. 334.

Miscellaneous Practice in Criminal Cases.

1. (April, 1795.) EXCEPTIONS: 1st. That the marshal had returned a greater number of jurors than the law authorized; and that he had returned a several panel in each case, instead of a general panel to try all the issues at this court.

2d. That a copy of the caption of the indictments, as well as a copy of the indictments themselves, had not been delivered to the respective prisoners.

3d. The lists furnished to the respective prisoners do not contain a sufficient specification of the addition and places of abode of the jurors and witnesses.

PETERS, Justice. I have considered the objections made to the panels, and do not conceive these objections relevant.

PATTERSON, Justice. With respect to the objection that a copy of the caption of the indictment has not been furnished to the prisoners, it may be observed that, although the practice of Pennsylvania has been different, yet the caption and the indictment seem naturally to form but one instrument; and copies of both should, therefore, be delivered, under the provisions of the act of Congress. . . .

The objection that the place of abode of the jurors and witnesses has not been sufficiently designated in the lists furnished to the prisoners, is likewise, in our opinion, a valid one. The

object of the law was to enable the party accused to prepare for his defense, and to identify the jurors who were to try, and the witnesses who were to prove, the indictment against him. *United States v. The Insurgents of Penn.*, 2 Dall. 335, 342.

2. (Jan., 1827.) Objections to the form and sufficiency of the indictment may, in the discretion of the court, be discussed, and decided during the trial before the jury; but, generally speaking, they ought regularly to be considered only upon a motion to quash the indictment, or in arrest of judgment, or on demurrer. *United States v. Gooding*, 12 Wheat. 461.

3. (Jan., 1827.) Where two or more persons are jointly charged, in the same indictment, with a capital offense, they have not a right, by law, to be tried separately, without the consent of the prosecutor; but such separate trial is a matter to be allowed in the discretion of the court. *United States v. Marchant*, 12 Wheat. 480.

4. (Oct., 1834.) The practice in this court, in capital cases, is for counsel to state the points of law, on which they wish instructions to the jury, at some time before the charge is given, that the court may have time to examine and consider them. *United States v. Gibert*, 2 Sumn. 22.

5. (May, 1854.) In a capital case, the junior counsel has a right, in opening, to argue at length the law and the facts; but only one counsel has a right to close, except where all the witnesses examined by the defendant's counsel have been previously examined before the grand jury, and were called at the trial by the government. *United States v. Mingo*, 2 Curt. C. C. 1.

6. (July, 1859.) A prisoner is not entitled to have a copy of the indictment against him furnished to him at the expense of the government. *United States v. Bickford*, 4 Blatchf. 337.

7. On a motion by the defendant that the government elect upon which of one hundred counts in an indictment it would proceed, the court refused to interfere. *Ib.*

8. (March, 1876.) Sec. 746 of the Revised Statutes provides that, when a trial has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of the court. On the trial of an indictment, after several jurors had been called and challenged, and three had been found competent and sworn, the court, on the last day of the term, directed that the trial pro-

ceed on the following day, which was the first day of the succeeding term. It so proceeded, and, after a conviction, it was, on a motion in arrest of judgment, *held*, that the trial had been commenced and was in progress, although a full jury was not impanelled before the term ended. *United States v. Loughery*, 13 Blatchf. 267.

9. If, after the trial of an indictment is commenced, the accused escapes from custody, and, for that reason, his further attendance cannot be had, the trial may proceed in his absence. *Ib.*

10. (April, 1815.) Where several persons are charged in one indictment with the same offense, each defendant has a right to be tried separately. *United States v. Sharp et al.*, Pet. C. C. 118.

11. (Nov., 1875.) The federal courts, on questions of criminal practice not regulated by act of Congress, are governed by the common law. *United States v. Hammond*, 2 Woods, 197.

Verdict in Criminal Cases.

1. (Feb., 1812.) Upon an indictment for putting goods on board a carriage, with intent to transport them out of the United States, contrary to the act of Jan. 9, 1809, the punishment of which offense is a fine of four times the value of the goods, it is not necessary that the jury should find the value of the goods. *United States v. Tyler*, 7 Cranch, 285.

2. (March, 1870.) On the trial of an indictment for a misdemeanor, after testimony had been given on both sides, and the evidence was closed, the court directed the jury to acquit the defendant, on the ground that the evidence did not warrant a conviction. *United States v. Fullerton*, 7 Blatchf. 177.

3. (May, 1879.) During the absence of the jury the court sent to them by the officer in charge, and in the absence of the prisoner, after exhibiting the same to the counsel for the prisoner, a direction in writing that they might deliver a sealed verdict to said officer, and then separate. They delivered a sealed verdict to said officer, and then separated. The next day they came into court, and announced by their foreman that they had agreed on a verdict, and that he had handed a sealed verdict to said officer. The jury then rendered a verdict of guilty, as stated in such sealed verdict, which was received by the court from said

officer, in the presence of the defendant, and which was thereupon announced and recorded in open court as a verdict of guilty. The jury were then polled, at the request of the defendant, and each of the jurors answered that the verdict announced was his verdict. The offense was, by the statute, declared to be a misdemeanor. *Held*, that no ground was shown for granting a new trial. *United States v. Bennett*, 16 Blatchf. 339.

4. (Dec., 1879.) Where the defendant is convicted of the several offenses charged in said indictment, he is, in effect, convicted on separate indictment, and may be separately punished for each offense proved. *United States v. Bennett*, 17 Blatchf. 357.

5. (April, 1846.) Where two or more defendants are jointly charged in the same indictment with murder, it is competent for the jury to find one guilty of murder and another of manslaughter; and on such a verdict being rendered, it will not be disturbed by the court as irregular. *United States v. Harding et al.*, 1 Wall. Jr. 127.

6. (May, 1839.) Where the jury have omitted to find on one of the counts [of an indictment], the court may permit such count to be discontinued. *United States v. Keen*, 1 McLean, 429.

Bill of Exceptions in Criminal Cases.

1. (Oct., 1834.) No bill of exceptions lies in any capital case in the courts of the United States. *United States v. Gibert*, 2 Sumn. 22.

Arrest of Judgment. Criminal Cases.

1. (July, 1859.) Where a prisoner demurs to an indictment, and the demurrer is heard and overruled, and he is then required to plead to it without having it read to him, and it is not read to the jury, the reading of it not being in either case demanded by him, such omissions to read the indictment furnish no ground for a motion in arrest of judgment. *United States v. Bickford*, 4 Blatchf. 338.

2. (Oct., 1808.) Where an indictment for perjury did not state the day upon which the trial took place, and on which the defendant was sworn in the case in which the perjury was alleged to have been committed, the court arrested the judgment. *United States v. Bowman*, 2 Wash. 328.

3. (Oct., 1854.) Where an indictment contains several counts, one of which is good, the judgment will not be arrested, although the other three are bad. *United States v. Potter*, 6 McLean, 186.

4. (June, 1855.) The verdict being general, if one count [in the indictment] is good, judgment will not be arrested. *United States v. Patterson*, 6 McLean, 466.

New Trial. Criminal Cases.

1. (April, 1799.) The court granted a new trial, on the ground that one of the jurors had made declarations, as well in relation to the prisoner personally as to the general question of the insurrection, which manifested a bias or predetermination that ought never to be felt by a juror. *United States v. Fries*, 3 Dall. 515, 518.

2. (June, 1869.) Whether the Attorney-General has power to give a direction to a district attorney in respect to his official action in regard to an indictment found by a grand jury, and presented by such grand jury to the court for its action thereon, *quære*. *United States v. Davis*, 6 Blatchf. 464.

3. Such a direction, if given, is for the district attorney alone, and does not control the court. *Ib.*

4. Where the court refused to allow a prisoner indicted for perjury to read, in opposition to the motion of the district attorney to proceed with the trial of the indictment against him, a letter from the Attorney-General to the district attorney, directing the latter to allow the prisoner an opportunity to place himself beyond the jurisdiction of the court, and also refused to allow the prisoner to show that he had not been afforded such opportunity, and the trial was proceeded with, and the prisoner was convicted, — *Held*, on a motion in arrest of judgment and for a new trial, that no error was committed. *Ib.*

5. Where a prisoner indicted for perjury was put upon his trial, and was present with his counsel during the impanelling of the jury, and during a portion of the opening of the case to the jury by the district attorney, and was then removed from the court-room by order of the court to an adjoining room, with liberty of access for his counsel, because he persisted in interrupting the district attorney in a loud voice, although admon-

ished by the court to refrain, and the opening by the district attorney proceeded and was concluded during the prisoner's absence, and the prisoner was present during the rest of the trial, and was convicted, — *Held*, on a motion in arrest of judgment and for a new trial, that no error was committed. *Ib.*

6. (May, 1878.) After the conviction of a defendant, he moved in arrest of judgment, and the case went to the Supreme Court on a certificate of division of opinion. After a decision by that court, the defendant moved in this court for a new trial. *Held*, that it was too late to make such a motion. *United States v. Simmons*, 14 Blatchf. 473.

7. (May, 1879.) The question whether, on the matter alleged to be obscene, a verdict that it is obscene [on an indictment for depositing obscene books, &c., in the mail] would be set aside as clearly against evidence and reason, can be fully raised before the trial, by a motion to be made on the indictment and a bill of particulars; and, under all other circumstances, it is for the jury to say whether the matter is obscene or not. *United States v. Bennett*, 16 Blatchf. 338.

8. (Nov., 1850.) On motions for new trial in criminal cases, affidavits of jurors ought not to be received to impeach their own verdict. *United States v. Clements*, 3 Hughes, 509.

9. (May, 1839.) The courts of the United States have power to grant new trials in criminal cases, as well in those cases that are capital as in others. There is no constitutional inhibition to the exercise of this power. *United States v. Keen*, 1 McLean, 429.

Sentence.

1. (Nov., 1861.) Although a trial and conviction have been had for a capital offense, before a Circuit Court when held by both of the judges thereof, it is competent for the same court, when held by only one of the judges, to pass the sentence. *United States v. Gordon*, 5 Blatchf. 19.

2. (Nov., 1870.) No suggestion being made to the court that the defendant had any defense to the indictment [under the twentieth section of the act of May 31, 1870 (16 Stat. at Large, 145), providing for the punishment of persons who illegally register, or attempt to register, at a registration of voters for an election for a representative in Congress], judgment absolute was

rendered against him, on the overruling of a demurrer to the indictment. *United States v. Quinn*, 8 Blatchf. 48.

3. (Oct., 1877.) The sentence of a convicted prisoner sentenced to be imprisoned for twelve months did not fix the place of confinement. The sentence was executed in Ludlow Street jail. Ten months of the term having expired, the prisoner applied for his discharge, on the ground that, under the act of March 3, 1875 (18 Stat. at Large, 479), he was entitled to a deduction of five days during every month. *Held*, that, as the State of New York had a system of commutation for its own prisoners, the deduction could not be allowed.

Held, also, that the prisoner would be entitled, under sec. 5543 of the Revised Statutes, to the deduction of one month, there allowed, on the certificate and approval required by that section. *United States v. Schroeder*, 14 Blatchf. 344.

4. (Jan., 1876.) A court has power to set aside or modify its judgments, in both civil and criminal cases, during the term at which they were given. *United States v. Harmison*, 3 Sawyer, 556.

Warrant to execute Sentence.

1. (Dec., 1861.) After a party has been convicted and sentenced in the Circuit Court for a criminal offense, and after a warrant is in the hands of the marshal commanding him to execute the judgment, the Circuit Court itself has no power to recall it. *Ex parte Gordon*, 1 Black, 503.

RULES OF PRACTICE
FOR THE
COURTS OF EQUITY OF THE UNITED STATES,
AND
DECISIONS CONSTRUING THE RULES.

PLEADINGS AND PRACTICE IN EQUITY.

Rule 1. — Preliminary Regulations.

The Circuit Courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

Rule 2. — Clerk's Office. Attendance of Clerk.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

Rule 3. — Chamber Orders, &c.

Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

Rule 4. — Order-book. Notice of Rules, Orders, &c.

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

1. (Dec., 1879.) Where the defendant in a suit in equity has appeared by a solicitor, notice of application for a decree, after an order *pro confesso*, must be given to such solicitor. *Bennett v. Hoefner*, 17 Blatchf. 341.

2. (April, 1813.) Notice of a motion to dissolve an injunction must be given, unless the cause has been set down for dissolution in a reasonable time before the motion is made. *Wilkins v. Jordan*, 3 Wash. 226.

3. (May, 1864.) The proper practice to punish for contempt in violating an injunction is by motion to commit, upon proper notice to the parties proceeded against. *Gray v. Railroad Co.*, Woolw. 63.

4. The rule requiring notice is salutary, and will not be relaxed by this court. *Ib.*

5. An order of arrest issued without such notice will be discharged on motion. *Ib.*

6. (March, 1870.) In equity, a party does not take notice of the filing of a plea or demurrer, unless notice thereof be entered in the order-book, as prescribed by Equity Rule 4. *Newby v. Railway Co.*, 1 Sawyer, 63.

Rule 5. — Motions, &c., grantable of course.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, — shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

Rule 6. — Motions on Rule-day.

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

Rule 7. — Process.

The process of subpœna shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the Circuit Court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Rule 8. — Final Process.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the Circuit Court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds

or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

Rule 9. — Writ of Assistance.

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

1. (Feb., 1813.) The Circuit Court of Tennessee, as a court of equity, cannot award a writ of *habere facias possessionem* to enforce its decree. *Wallen v. Williams*, 7 Cranch, 602.

2. (Oct., 1874.) A writ of assistance is an appropriate process to issue from a court of equity, to place a purchaser of mortgaged premises under its decree in possession, after he has received the commissioner's or master's deed, as against parties who are bound by the decree, and who refuse to surrender possession pursuant to its direction or other order of the court. *Terrell v. Allison*, 21 Wall. 289.

3. (Sept., 1857.) Writ of assistance will be granted when the defendants refuse to surrender under the decree. *Pratt v. Burr*, 5 Biss. 36.

4. (1870.) The power of a court of chancery to put the purchaser of the mortgaged premises into possession by a writ of assistance or summary proceedings extends only to the parties to the suit and those coming in under them after suit commenced, and does not extend to the case of the wife of the mortgagor not a party to the suit, claiming under color of title acquired from one of the defendants before suit brought, although such title may be void or inoperative by statute. *Thompson v. Smith*, 1 Dill. 458.

Rule 10. — Process for enforcing Obedience to Orders.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.

Rule 11. — No Issue of Process of Subpœna until Bill filed.

No process of subpœna shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

Rule 12. — Subpœna, Issue of. When Returnable. Memorandum on.

Whenever a bill is filed, the clerk shall issue the process of subpœna thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpœna shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpœna may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpœna against all the defendants.

Rule 13. — Service of Subpœna, how made.

The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

1. (Feb., 1809.) The Circuit Court has jurisdiction in a suit in equity, to stay proceedings upon a judgment at law between the same parties, although the subpœna be served upon the defendant out of the district in which the court sits. *Logan v. Patrick*, 5 Cranch, 288.

2. (Oct., 1877.) Upon a supplemental bill in chancery, a

subpœna is not required, unless new parties are made. A rule upon parties already served, to answer the supplemental bill, is sufficient. *Shaw v. Bill*, 3 Otto, 10.

3. (Oct., 1868.) A defendant who voluntarily appears in a suit in this court waives his right to urge, as an objection to the jurisdiction of this court, that he was not found, or served with process, in this district. *Winans v. Railroad & Navigation Co.*, 6 Blatchf. 215.

4. (Oct., 1871.) An irregularity in the service on a defendant of the subpœna in a suit in equity affords no reason for withholding an injunction against him, if he has had notice of the motion for the injunction, and appears to oppose it. *Thayer v. Wales*, 9 Blatchf. 170.

5. (April, 1876.) When a court of equity was called on, for the purpose of preserving a trust estate situate mainly within its jurisdiction, to remove a non-resident naked trustee, and appoint another in his stead, it had the power to do so *ex parte*, in a case where service on the absent trustee was impossible. *Ketchum v. Railroad Co.*, 2 Woods, 532.

6. The fact that such absent trustee was within the territory of a country at war with the country in which the court was sitting did not detract from the power of the court to remove him and appoint another, but furnished a good reason for its exercise. *Ib.*

7. (June, 1875.) In such a suit [by junior mortgagees to foreclose their mortgage], the prior mortgagees can be made parties only by service of process or voluntary appearance. A general notice calling upon them to present their claims will not make them parties or bind them. *Young v. Railroad Co.*, 2 Woods, 607.

8. If, however, such prior mortgagees are represented by trustees who are actual parties to the suit, then a notice calling upon them to present their claims before the master would be effectual, and the decree of the court would bind them. *Ib.*

9. (Oct., 1843.) The process on the defendant in chancery must be served twenty days before the defendant is bound to appear. And a rule for answer, where the process has not been so served, is irregular. *Treadwell v. Cleaveland*, 3 McLean, 283.

10. A decree *pro confesso*, for want of an answer, under such a rule, is also irregular. *Ib.*

11. And if a final decree is entered, in virtue of the above proceedings, the court, on motion, will set the whole aside. *Ib.*

12. (Sept., 1880.) A suit to set aside a decree of foreclosure and sale thereunder is not so far a mere continuation of the original foreclosure suit as to authorize the service of subpœnas upon persons without the territorial jurisdiction of the court. *Pacific Railroad v. Railway Co.*, 1 McCrary, 647.

Subpœna. Service on Attorney or Solicitor.

1. (Dec., 1869.) A bill which is in no wise auxiliary to an original suit, nor in continuation of that proceeding, does not present a case proper for substituted service. *Rubber Company v. Goodyear*, 9 Wall. 807.

2. (May, 1847.) A service of the bill of injunction in such a case [against proceedings at law which have gone to judgment and not to execution] may be good as a substituted service, if made on the attorney of the plaintiff in the action at law. *Sawyer v. Gill*, 3 Woodb. & M. 97.

3. He will be allowed time to communicate with his client. But such a service is not now good in a cross-action; though, if made, the first action will be continued till the defendant in the cross-action voluntarily appears, or authorizes an appearance for him. *Ib.*

4. (April, 1853.) Where the defendant in an action at law brought a suit in equity, in the same Circuit Court, against the non-resident plaintiff in that action, to restrain its further prosecution, — *Held*, that service of the subpœna in the equity suit, upon the attorney for the plaintiff in the action at law, was a sufficient service to confer jurisdiction. *Segee v. Thomas*, 3 Blatchf. 11.

5. (April, 1810.) Rule to show cause why an injunction to stay waste should not be granted, and why service of the subpœna upon the attorney of the defendant, in a suit depending against the defendant for slander of his title to the land mentioned in the bill, should not be considered as a service on Suckley. *Hitner v. Suckley*, 2 Wash. 465.

6. If a judgment at law be obtained, the service of a subpœna on the attorney of the plaintiff, he being absent from the state, will be deemed good, where the subject in controversy is the

same with the matter in the suit for which the judgment was rendered. *Ib.*

7. (April, 1823.) The court will not order service of a subpœna in equity on the defendant's attorney-at-law to be a good service, except in cross-suits, and injunctions to stay proceedings at law, on the ground of the defendant's residing out of the state. *Eckert v. Bauert*, 4 Wash. 370.

8. (Oct., 1823.) Practice of the court in equity cases, in reference to the service of the subpœna issued to the defendant or his attorney, on the record of a suit at law. *Ward v. Seabry*, 4 Wash. 426.

9. (Oct., 1824.) In cases of injunctions to stay proceedings at law, and in cross-suits in equity, and in no others, will the court direct service of the subpœna to be made on the attorney-at-law, or upon the adverse solicitor in the cross-suit. *Ward v. Sebring*, 4 Wash. 472.

10. (1878.) The general chancery rule is, that service of subpœna to answer a cross-bill cannot be made upon the solicitor of the plaintiff in the original bill; but to this rule the United States Circuit Court recognizes two exceptions: one in cases of injunctions to stay proceedings at law, and the other in cross-suits in equity where the plaintiff at law in the first, and the plaintiff in equity in the second, case reside beyond the jurisdiction of the court; and this only for the purpose of preventing a failure of justice. *Lowenstein v. Glidewell*, 5 Dill. 325.

11. (Sept., 1880.) The service of subpœnas on solicitors and attorneys of persons before the court in the former suit is of no validity until an application to the court has first been made, setting forth the circumstances which render such service proper, and an order obtained from the court directing that service be made, and that such service, when made, should answer as a substitute for actual service on the parties so represented by the attorneys or solicitors. *Pacific Railroad v. Railway Co.*, 1 McCrary, 647.

12. (April, 1871.) In case of a bill in equity to stay proceedings at law, or a cross-bill, where the plaintiff in the action at law or original bill is beyond the jurisdiction of the court, the court will order the subpœna to appear, to be served upon the attorney of such absent plaintiff; but when the judgment in such action at law has been enforced, the authority of the attorney to

represent the absent party is at an end, and such order will not be made. *Kamm v. Stark*, 1 Sawyer, 547.

Service on Non-resident by Order and Publication.

1. (Oct., 1878.) Where a suit in equity to enforce a lien on property within the district was pending at the time of the passage of the act of June 1, 1872 (17 Stat. 196), and a party who was not an inhabitant of, or found within, the district was thereafter, by an amended bill, made a defendant, — *Held*, that the court could acquire jurisdiction in the mode prescribed by the thirteenth section of that act. *McBurney v. Carson*, 9 Otto, 567.

2. (Nov., 1873.) The United States courts have no power to effect a constructive service of process on non-residents. If non-residents are necessary parties, unless they voluntarily appear, the suit cannot be maintained in the federal courts. If they do appear as defendants, and are citizens of the same state with the complainants, the court is ousted of jurisdiction. *Parsons v. Howard*, 2 Woods, 1.

3. *Seemle*, that a suit against partners may be brought in a federal court, although some of them may not be found within the jurisdiction of the court. *Ib.*

4. NOTE. — By a late statute, absent defendants may be cited by an order of publication, when the suit is brought to enforce a legal or equitable claim or lien on real or personal property within the district. See act of June 1, 1872, Rev. Stat. s. 738. *Ib.*

5. (Nov., 1875.) Shares of stock in an incorporated company, held and claimed by a non-resident of the district within which the company has its domicile, cannot be considered "personal property within the district," so as to authorize the court, in a suit in which plaintiff sets up title to the stock, to order the holder to be constructively served in the manner provided by sec. 738, Rev. Stat. *Kilgour v. Gas Light Co.*, 2 Woods, 145.

6. (1873.) The act of June 1, 1872 (17 Stat. 198, s. 13), authorizes, in certain cases, the courts of the United States to exercise jurisdiction in equity over the property of absent defendants, within the district where the suit is brought; but the act recognizes the superiority of personal over constructive service; and the practice under the act should be such as to secure

personal service whenever this is practicable, and to resort to constructive service by publication only when the better mode is not practicable within a reasonable time, and by the exercise of reasonable diligence. *Bronson v. Keokuk*, 2 Dill. 498.

7. The order directing the absent defendant to appear, plead, &c., must be made by the court in term. *Ib.*

Rule 14. — Alias Subpœna.

Whenever any subpœna shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpœna, *toties quoties*, against such defendant, if he shall require it, until due service is made.

Rule 15. — Service of Process, by whom.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

Rule 16. — Entering Suit upon Docket.

Upon the return of the subpœna as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

Rule 17. — Appearance.

The appearance-day of the defendant shall be the rule-day to which the subpœna is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

1. (Jan., 1838.) In a proceeding by a bill and subpœna in chancery, in the Circuit Court of the United States, of Louisiana, against upwards of two hundred defendants, some of the defendants appeared, and an affidavit was made, that in consequence of an epidemic in New Orleans and at La Fayette, and the absence of many of the defendants, it had been impossible for the defendants to prepare for their defense, and they prayed time for

the same. The Circuit Court allowed the defendants until the following term to appear and make defense. BY THE COURT: The conduct of the Circuit Court appears to have been strictly conformable to the practice and principles of a court of equity. *Poultney v. City of La Fayette*, 12 Pet. 472.

2. Every court of equity possesses the power to mould its rules in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice. And it is not only in the power of the court, but it is its duty to exercise a sound discretion upon this subject, and to enlarge the time whenever it shall appear that the purposes of justice require it. The rules in chancery proceedings in the Circuit Courts, prescribed by this court, do not, and were not intended to deprive the courts of the United States of this well-known and necessary power. *Ib.*

3. (Oct., 1830.) If one defendant does not appear, and is not compellable to appear, and is a necessary party to the bill in equity, the other defendants, who have appeared and answered the bill, may move for a dismissal of the suit for non-prosecution of the bill, against the non-appearing defendant; and the court will grant a further time for the appearance of such defendant, if it seems reasonable, after which the bill is to be dismissed, unless such defendant appears and answers. *Picquet v. Swan*, 5 Mason, 561.

4. (June, 1878.) An appearance, after such a decree was rendered [in an attachment case, instituted during the war, by seizure of the property and publication of notice], for the mere purpose of moving to strike the case from the docket, on the ground that no process had been served, was not such an appearance as waived previous defects in the service, and could not have the retroactive effect of validating a decree totally void. *Dorr v. Gibboney's Executrix*, 3 Hughes, 382.

5. (July, 1877.) Equity. The district attorney is not so far an officer of the court, that the court can compel him to enter the appearance of the United States. *Fifth National Bank v. Long*, 7 Biss. 502.

6. The United States can be brought into court by the entry of an order, that it shall plead, &c., within a given time, and the service of a copy of such order upon the proper representatives of the government. *Ib.*

Rule 12. — Bills taken Pro Confesso. Attachment to Answer.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

Rule 19. — Decree after Order Pro Confesso, unless, &c.

When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

1. (Oct., 1876.) It is error to render a final decree for want of appearance, at the first term after service of subpœna (Equity Rules, 18, 19), unless another rule-day has intervened. *O'Hara v. Mc Connell*, 3 Otto, 150.

Rule 20. — Frame of Bills.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the Circuit Court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says that," &c.

Bill. Address.

1. (Jan., 1874.) A bill addressed to the "Circuit Court, &c., in chancery sitting," is a sufficient address. *Sterrick v. Pugsley*, 1 Flipp. 350.

Bill. Names of Parties.

1. (May, 1868.) A bill in equity is defective, which does not give the full names of all the parties to whom it refers. *Barth v. Makeever*, 4 Biss. 206.

2. (Nov., 1873.) Persons cannot be made parties to a bill in equity in the United States courts, by designating them by a fictitious name in the introductory part of the bill, and in the prayer for process. *Kentucky Silver Mining Co. v. Day*, 2 Sawyer, 468.

3. A service of subpoena upon persons so designated is void, and will be set aside. *Ib.*

4. An appearance does not cure such defects in the writ and service, or make such persons parties on the record. *Ib.*

Bill. Misjoinder of Parties.

1. (Sept., 1867.) Where a misjoinder of parties is apparent on the face of a bill, it should be taken advantage of by demurrer or answer, or it will be deemed to be waived. *Bunce v. Gallagher*, 5 Blatchf. 482.

Bill. Averment of Citizenship.

1. (Jan., 1834.) The caption of the bill was in the following terms: "Thomas Jackson, a citizen of the State of Virginia,

William Goodwin Jackson, and Maria Congreve Jackson, citizens of Virginia, infants, by their father and next friend, the said Thomas Jackson, *v.* The Reverend William E. Ashton, a citizen of the State of Pennsylvania. In equity." In the body of the bill, it is stated that "the defendant is of Philadelphia."

By THE COURT: The title or caption of the bill is no part of the bill, and does not remove the objection to the defects in the pleadings. The bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case. *Jackson v. Ashton*, 8 Pet. 148.

2. The only difficulty which could arise to the dismissal of the bill presents itself upon the statement, "that the defendant is of Philadelphia." If this were a new question, the court might decide otherwise; but the decisions of the court, in cases which have heretofore been before it, have been express upon the point. *Ib.*

3. (Jan., 1835.) The bill contains no averment of the actual domicile of the testator at the time of the making of his will, or at the time of his death, or at any intermediate period; nor does the answer contain any averments of domicile which supply these defects in the bill, even if it could so do; but in point of law it could not. *Harrison v. Nixon*, 9 Pet. 483.

4. Every bill must contain in itself sufficient matter of fact, *per se*, to maintain the case of the plaintiff. *Ib.*

5. (Oct., 1827.) In all bills in equity in the courts of the United States the citizenship should appear on the face of the bill, to entitle the court to take jurisdiction; otherwise the bill will be dismissed. *Dodge v. Perkins*, 4 Mason, 435.

6. (May, 1834.) Where the jurisdiction of the Circuit Court depends upon citizenship of the parties in different states, this must appear by proper averment in the record; and if it do not, the omission will be fatal at any stage of the cause. *Wood v. Mann*, 1 Sumn. 578.

7. (May, 1844.) The citizenship of the plaintiff and of the defendant should be stated in the bill. *Vose v. Philbrook*, 3 Story, 336.

8. (Oct., 1846.) Where, in a bill in equity, the complainants and part of the respondents are described as of one state, and those of the respondents, on whom service is made and who appear, as of the state where the suit is brought, a demurrer to

the bill for want of jurisdiction cannot be sustained. *Heriot v. Davis*, 2 Woodb. & M. 229.

9. The case will proceed against the person appearing and notified, without prejudice to the others, where their interests can be severed and tried separately. *Ib.*

10. (June, 1828.) The fact that the subject-matter of a contract sought to be enforced is a patent-right does not *per se* give the courts of the United States jurisdiction; and a bill filed for the specific performance of such a contract must contain averments to show that the court has jurisdiction. *Burr v. Gregory*, 2 Paine, 426.

11. (March, 1869.) In order to give this court jurisdiction of an original suit on the ground of parties, it must be a suit between a citizen of the State of New York and a citizen of another state; and the necessary averments of citizenship, to confer jurisdiction, must appear on the face of the bill. *Mersevole v. Paper Collar Co.*, 6 Blatchf. 356.

12. (Jan., 1871.) An allegation in a bill in a suit in equity, brought in this court by such corporation [national banking corporation, incorporated under the act of June 3, 1864 (13 Stat. at Large, 101)], as plaintiff, that it is "a citizen of the State of Illinois, and located and residing and doing business in the city of Chicago, in said state," and that the defendant is a citizen of New York, is sufficient, under the eleventh section of the act of Sept. 24, 1789 (1 Stat. at Large, 78), to give this court jurisdiction of the suit. *National Bank v. Baack*, 8 Blatchf. 137.

13. (Dec., 1839.) To give jurisdiction, the citizenship of the defendants is as necessary to be stated as that of the complainants. *Findlay's Ex'rs v. Bank of United States*, 2 McLean, 44.

14. Where the complainants, being citizens of the state, brought their bill against the Bank of the United States and certain individuals whose citizenship is not named, the court cannot take jurisdiction. *Ib.*

15. (Jan., 1868.) A bill in equity in this court must distinctly state the citizenship of every necessary party to it, and show that the complainants and defendants are citizens of different states. And if it fails to do this, it will be bad on demurrer; and any decree on it in favor of the complainants would be liable to reversal in the Supreme Court. No appearance, demurrer, or

answer to such a bill will waive this omission in it. *Speigle v. Meredith*, 4 Biss. 120.

Bill. Averments. Substance.

1. (Feb., 1826.) There must be sufficient equity apparent on the face of the bill to warrant the court in granting the relief prayed ; and the material facts on which the plaintiff relies must be so distinctly alleged as to put them in issue. *Harding v. Handy*, 11 Wheat. 103.

2. (Jan., 1840.) In such a bill, an allegation that the amount due on the bill of exchange was paid is sufficient, without stating the value or nature of the effects out of which the payment was made. *Atkins v. Dick*, 14 Pet. 114.

3. (Jan., 1843.) Where a bill substantially charges that there is a fraudulent attempt to hold property under a deed, absolute on the face of it, but intended as a security for money loaned, evidence will be admitted to ascertain the truth of the transaction. *Morris v. Nixon*, 1 How. 118.

4. (Jan., 1849.) A bill in chancery, filed by the purchaser of land against his vendor, to restrain the collection of the purchase-money, upon the two grounds of want of title in the vendor and his subsequent insolvency, without charging fraud or misrepresentation, cannot be sustained. *Patton v. Taylor*, 7 How. 132.

5. Relief will not be given on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue in the pleadings. *Ib.*

6. (Jan., 1849.) The general rules stated which govern a court of equity in opening accounts and sustaining claims which are barred by the statute of limitations. *Stearns v. Page*, 7 How. 819.

7. Great caution is exercised, and the complainant is holden to stringent rules of pleading and evidence. *Ib.*

8. He must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment ; must specify how, when, and in what manner it was perpetrated. *Ib.*

9. The charges must be definite and reasonably certain, capable of proof and clearly proved. *Ib.*

10. If a mistake is alleged, it must be stated with precision and made apparent, so that the court may rectify it, with a feel-

ing of certainty that they are not committing another and perhaps greater mistake. *Ib.*

11. And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made. *Ib.*

12. (Dec., 1851.) Where a bill in chancery states that, at an execution sale, which was alleged to have been open and fair, the complainant purchased, for the sum of \$600, certain promissory notes secured by mortgage, amounting in the whole to \$260,000, and the bill was demurred to, and the demurrer sustained by the Circuit Court, this judgment must be reversed. *Erwin v. Parham*, 12 How. 197.

13. Mere inadequacy of price does not of itself furnish a sufficient reason for dismissing the bill, or deciding that the complainant was entitled to no relief whatever. *Ib.*

14. (Dec., 1869.) Upon a bill filed under the fiftieth section of that act [National Bank Act of June 3, 1864 (13 Stat. at Large, 116)], by a receiver, against the stockholders, where the bank fails to pay its notes, it is indispensable that action on the part of the comptroller of the currency, touching the personal liability of the stockholders, precede the institution of any suit by the receiver; and the fact must be averred in the bill. *Kennedy v. Gibson*, 8 Wall. 498.

15. (Dec., 1872.) Affirmative relief will not be granted in equity, upon the ground of fraud, unless it be made a distinct allegation in the bill. *Voorhees v. Bonesteel*, 16 Wall. 16.

16. (Oct., 1874.) Where a complainant in equity wishes to rely on the fact that a deed, in form absolute, was in reality a mortgage, which has been paid, he must allege the fact in his bill. *Grosholtz v. Newman*, 21 Wall. 481.

17. (Oct., 1877.) The bill in this case prayed for a dissolution of the partnership between the parties, and a sale of certain lands by them held as tenants in common, which, it was alleged, were not susceptible of division without prejudice to them. There was no demurrer to the bill, nor did the answer raise any objection to the jurisdiction. *Held*, 1. That as the allegations of the bill touching the lands conform to the provision of the Code of California, and are sustained by the proofs, the decree below

awarding partition was proper. 2. That if there is anything in the allegations which concern the partnership, which introduces another matter, the objection should have been taken by demurrer for multifariousness. *Briges v. Sperry*, 5 Otto, 401.

18. (Oct., 1878.) It is essential to a bill in chancery, on behalf of the United States, to set aside a patent for lands, or the final confirmation of a Mexican grant, that it shall appear in some way, without regard to the special form, that the Attorney-General has brought it himself, or given such authority for bringing it as will make him officially responsible therefor through all stages of its presentation. *United States v. Throckmorton*, 8 Otto, 61.

19. (Oct., 1880.) A company who, under a contract with a city, was constructing water-works, executed a mortgage on them, to secure certain bonds and the coupons thereto attached, which stipulates that if the company shall fail, for the space of ninety days, to pay the coupons when they shall become due, provided such failure is not caused by the city under the contract, all of the bonds shall become due, and the lien of the mortgage shall be enforced for the whole debt. Coupons remained due and unpaid for the specified period. *Held*, that the bill need not negative the failure of the city, but that such failure, if it existed, must be set up as matter of defense. *Water-works Company v. Barret*, 13 Otto, 516.

20. (Oct., 1880.) A bill to restrain the collection of a state tax upon the shares of a national bank is bad on demurrer, where it does not appear that there is any statutory discrimination against them, or that they, under any rule established by the assessing officers, are rated higher in proportion to their actual value than other moneyed capital. *National Bank v. Kimball*, 13 Otto, 732.

21. The bill in this case avers that the same percentage is assessed on such shares as on other property, and that they are rated at about one-half their actual value. No case for relief is made by averring that the assessments are unequal and partial, and some other property is rated for taxable purposes at less than one-half its cash value. *Ib.*

22. (Nov., 1812.) A bill to charge the executors of a deceased partner with a partnership debt, where the other partner survives, must expressly charge the insolvency of the survivor. *Reimsdyk v. Kane*, 1 Gall. 371.

23. (May, 1829.) If a bill admits the defendant to be a purchaser of the legal title, and the plaintiff sets up an equitable title, and demands a conveyance of the legal title to himself, he must aver and prove all the material facts to entitle him to such conveyance. If he relies on notice in the purchaser, he must aver it in his bill, and, if not admitted by the answer, he must prove the notice before he can have relief. *McNeil v. Magee*, 5 Mason, 245.

24. (Oct., 1843.) Certain timber land was purchased by A., of X. and Z., A. agreeing to pay therefor at the rate of one dollar per thousand feet for all the good pine timber, to be ascertained by certain persons appointed by all parties, who were accordingly appointed, and made the estimate. A. subsequently conveyed a portion to D.; D. agreeing with X. and Z. to pay therefor one-fourth of the price in money and the remainder in notes, and they giving a bond to convey to him the land on full payment of the notes. D. died insolvent, and A. became his administrator, and agreed with X. and Z., in his behalf, to surrender the bond for the notes, which was done. The present bill was afterward brought by A., as administrator of D., and charged that there was a gross error in the original appraisement, unknown to him (A.), by which D. had been induced to make the said bargain, and prayed that the bargain should be set aside, and the purchase-money paid by D. should be refunded. But A. made no personal claim for relief. *Held*, 1st, That the bill was objectionable for multifariousness, in mixing up the independent claims which A. had personally, and which he had as administrator: 2d, That it set forth no case for cancelling the original agreement. 3d, That, even if it had, it was too defective and loose to support such a claim, in not bringing the proper parties before the court, and in alleging a mere mistake, without fraud, as a ground of relief, which, under the circumstances, was not sufficient. *Carter v. Treadwell*, 3 Story, 25.

25. (May, 1844.) *Held*, that even were it a debt now due, it was contracted in a foreign country [Port au Prince], of the laws of which the court could not judicially take notice; and as this case depended on the *lex loci contractus*, it should have been especially averred in the bill. *Vose v. Philbrook*, 3 Story, 335.

26. (Oct., 1845.) Allegations in bills need not set out all the facts, in detail, which are to be proved; but, if they do not, they

must contain general statements, under which the details proved are pertinent. *Nesmith v. Calvert*, 1 Woodb. & M. 34.

27. (Oct., 1846.) A bill charging falsehood and fraud in a sale, as to the exaggerated quantity of timber on land, may contain enough to justify setting the sale aside for a gross mistake in the quantity, without setting up the latter as a specific and separate cause; but it is better to have such cause stated independently, in order to give clearer notice to the respondents of what is to be contested. *Smith v. Babcock*, 2 Woodb. & M. 246.

28. (Sept., 1852.) If a bill charges fraud, as the ground of relief, it must be proved; and the proof of other facts, though included in the charge, and sufficient under some circumstances to constitute a claim to relief under another head of equity, will not prevent the bill from being dismissed. *Fisher v. Boody*, 1 Curt. C. C. 206.

29. If a bill to rescind a deed is filed after a considerable lapse of time, and the exercise by the plaintiff of the powers of an owner over the property, so as to change its character or value materially, the bill must state sufficient reasons for the delay; and those reasons must be made out in proof. *Ib.*

30. (Sept., 1853.) To avoid the bar of the statute of limitations, the complainant must not only allege his ignorance of the fraud, but when and how it was discovered; and must offer satisfactory evidence to prove these averments. *Carr v. Hilton*, 1 Curt. C. C. 390.

31. (Oct., 1862.) Accusations charging that probate accounts, which had been settled for a long time, were fraudulent, must be specific, and must point out the items of account charged to be false, especially when, as in this case, it appears that all the parties implicated, some of whom had the best means of knowledge in regard to the transaction, were dead. *Badger v. Badger*, 2 Cliff. 137.

32. (May, 1876.) The allegations and proofs in suits in equity must set forth and support the same cause of action. *Bradley v. Converse*, 4 Cliff. 366.

33. A party cannot state one case in his bill of complaint and make a different one by his proofs. *Ib.*

34. Facts necessary to maintain the suit and obtain relief must be stated in the bill. *Ib.*

35. Relief cannot be granted for matters not charged. *Ib.*

36. A party may frame his bill in the alternative, if the title to relief will be the same in either alternative, although the case be presented upon allegations resting on wholly distinct and independent grounds. *Ib.*

37. (Dec., 1846.) Where a bill in equity claimed a forfeiture of pieces of music, under sec. 7 of the act of Feb. 3, 1831 (4 Stat. at Large, 438), and also sought a discovery from the defendants of the number of pieces printed by or for them, and of the number on hand, — *Held*, that the bill was bad on special demurrer. *Atwill v. Ferrett*, 2 Blatchf. 40.

38. The defendants cannot be directly required to convict themselves of the act which carries with it the forfeiture. *Ib.*

39. Where a bill in equity contains allegations which constitute an assertion of authorship under the Copyright Act, in terms sufficiently explicit to constitute a perfect title at law in the plaintiff, the bill will be held good on general demurrer, notwithstanding the defectiveness and inconsistency of other allegations in the bill as to authorship. *Ib.*

40. Where a bill in equity against three defendants showed title in the plaintiff to a copyright, and a wrongful violation of it by all the defendants, and injuries inflicted and apprehended from such violation, and prayed for an injunction against all the defendants, and also for a discovery from all in aid of a suit at law against one for the same violation, — *Held*, on general demurrer to the whole bill, that the relief by injunction was not dependent on the discovery prayed, and that, although the bill was bad as a bill of discovery, yet it was good as an injunction bill, and that the demurrer must be overruled. *Ib.*

41. (Oct., 1868.) Where a bill is filed in this court against a corporation created by the State of Pennsylvania by a judgment creditor thereof, for a sequestration of its property, rights, and franchises, and for the appointment of a receiver thereof, with power to collect from its stockholders the amount of their unpaid subscriptions, or sufficient thereof to satisfy such judgment, and for the payment therewith of such judgment, it is a sufficient statement, in such bill, of the amount and value of such unpaid subscriptions to state that it has unpaid subscriptions to its stock much more than sufficient to pay such judgment. *Winans v. Railroad & Navigation Co.*, 6 Blatchf. 215.

42. (March, 1870.) A plaintiff who claims title through such

an instrument [an assignment of all the patentee's right, title, and interest in his invention and patent within and throughout a specified territory], and sues in equity for the infringement of the patent, need not aver in his bill the recording of the instrument, but may treat the defendant as a wrong-doer, and put him to set up in his answer that he is a *bona fide* purchaser for value, without notice. *Perry v. Corning*, 7 Blatchf. 195.

43. (June, 1870.) Where a bill in equity stated that it was brought by the United States at the relation of certain persons, and did not state that the United States brought it by their district attorney, and was subscribed by certain other persons as solicitors for the plaintiffs; and the prayer of it was that certain letters-patent of the United States issued to the defendant might be surrendered to be cancelled, — *Held*, on demurrer to the bill that it was bad, as not stating a case which entitled the United States to the relief sought. *United States v. Doughty*, 7 Blatchf. 424.

44. This court can, under the thirty-fifth section of the act of Sept. 24, 1789 (1 Stat. at Large, 92), recognize the United States as plaintiffs on the record only when the record shows that the United States appear as plaintiffs by the district attorney. *Ib.*

45. (April, 1871.) Where the bill sets out acts *ultra vires* in issuing shares of stock, and breaches of trust, which are frauds on the stockholders, inasmuch as such acts and breaches of trust are beyond the power of the corporation to affirm or sanction, it is not necessary that the stockholder [who files a bill in his own name on behalf of himself and all others standing in the same situation, making the corporation a party defendant, to compel the ministerial officers of the corporation to account for breach of official duty or misapplication of corporate funds], should aver that he has applied to the corporation or its board of directors to bring the suit, and that they have refused. *Heath v. Erie Railway Co.*, 8 Blatchf. 347.

46. Where the corporation is under the control of the defendants who must be sued, and an excuse is given for the bringing of the suit by the stockholder, which is equivalent to a refusal by the directors, on request, to bring the suit, the suit may be brought by the stockholder without showing such request and refusal. *Ib.*

47. (Feb., 1873.) A plaintiff in a suit in equity can recover

only upon the case made by his bill, and not upon that made in the evidence. *Battle v. Mutual Life Ins. Co.*, 10 Blatchf. 417.

48. An admission in the answer will be of no use to the plaintiff, unless it is put in issue by some charge in the bill. *Id.*

49. (July, 1875.) In a suit in equity, brought by an assignee in bankruptcy, to recover certain notes alleged to have been transferred in violation of the Bankrupt Act, the bill alleged the filing of a voluntary petition by the bankrupt, the appointment of the assignee, and the assignment to him. These allegations were admitted by the answer. *Held*, that it was not necessary that the bill should allege directly that there had been an adjudication of bankruptcy. *Lakin v. First National Bank*, 13 Blatchf. 83.

50. (Oct., 1808.) [Where a mortgage had been assigned in payment of a debt, and the mortgagor had no title to the mortgaged premises, and was a bankrupt, which was known to the assignors, and concealed at the time of the assignment, and a bill in equity was filed against the assignors of the mortgage, to obtain payment of the original debt for which the assignment was made], it is no objection to the bill that it does not contain an offer to reassign the mortgage. The court will order this to be done in the decree, if they deem it necessary. *Pagan v. Sparks*, 2 Wash. 325.

51. (April, 1852.) Where a bill sets forth such leading facts as do not, when analyzed, show a case of fraud or mistake, allegations or averments in the bill that there was fraud or mistake, and the expressions "fraudulently," "deceitfully," "by mistake," &c., interspersed throughout it, will not bring the case within equitable jurisdiction, even on a demurrer to the bill. *Magniac v. Thompson*, 2 Wall. Jr. 209.

52. (Oct., 1878.) It is incumbent on suitors who invoke the jurisdiction of the courts of the United States to bring themselves clearly within that jurisdiction. *Copeland v. Railroad Co.*, 3 Woods, 651.

53. (Oct., 1861.) The complainant in a bill in equity is not required to set out all the minute facts of his case. The general statement of a precise fact is usually sufficient. *Dunham & St. John v. Railroad Co.*, 1 Bond, 492.

54. Where a bill in equity distinctly alleges that the defendants subscribed stock for the express purpose of constructing a branch railroad, called the Eaton and Piqua Branch, and are

liable in equity to account to the complainants therefor, such statement embraces facts which constitute the right of complainants to enforce the claim asserted by them, and it is not necessary for the defense that the bill should state all the particulars of the subscriptions, including the amount subscribed and due by each one. *Ib.*

55. (Dec., 1838.) The complainant alleges, generally, that he will be injured in his property by the construction of the dams, and on this ground prays an injunction; but he does not show how he will be injured. This is necessary, that the court may judge whether the wrong complained of entitles him to an injunction. *Spooner v. McConnell*, 1 McLean, 338.

56. (July, 1869.) An illegal subscription of railroad stock by a city may be ratified under a subsequent act of the legislature authorizing its ratification. A bill alleging such subscription ought to aver the ratification. But the answer, by putting in issue the question of such ratification, may supply the want of such averment in the bill. *Putnam v. City of New Albany*, 4 Biss. 365.

57. (April, 1870.) Where a woman claims to have been the wife of a man, it is an insuperable objection to such claim that the pleadings do not contain an allegation of marriage to him, with the circumstances of time and place, and that she withholds her testimony as a witness upon the same point. *Holmes v. Holmes*, 1 Sawyer, 99.

58. (April, 1875.) A bill in chancery to restrain the infringement of a copyright acquired under Chapter III. Title LX. of the Revised Statutes, which does not allege the performance of the acts required to be performed by the author in sec. 4956 of said statutes, is insufficient. *Parkinson v. Laselle*, 3 Sawyer, 330.

Bill for Discovery.

1. (Jan., 1828.) In a case where the loss of a deed or other instrument is made the ground for coming into a court of equity for discovery and relief, an affidavit of its loss must be made and annexed to the bill; and the absence of such affidavit is good cause of demurrer to the bill; yet, if the party charged by the bill failed to demur for that cause, but answered over to the bill, or permitted it to be taken for confessed, by default, against him,

it *seems* that the absence of the affidavit is not a sufficient cause for the reversal of the decree. *Findlay v. Hinde*, 1 Pet. 241.

2. If a deed has not been proved, acknowledged, and recorded, and would therefore be insufficient against subsequent purchasers without notice, parties who claim under such deed have a right to come into a court of equity, for a discovery, upon the ground of notice; and if notice should be brought home to subsequent purchasers, the complainants have a right to relief, by a decree quieting the title. *Ib.*

3. (June, 1828.) A bill for a discovery of assets lies in equity, notwithstanding a remedy at law. *Pratt v. Northam*, 5 Mason, 95.

4. (Oct., 1845.) Where the aid of a court of chancery is indispensable, to obtain the discovery of the important facts in the case, an application for relief can be sustained in connection with that discovery, in the Circuit Courts of the United States, notwithstanding the sixteenth section of the Judiciary Act prohibits such relief when it can be obtained at law in as ample a manner. *Warner v. Daniels*, 1 Woodb. & M. 91.

5. (Oct., 1846.) An averment of fraud in the sale of a promissory note, and a request for a discovery of facts accompanying the sale, furnish sufficient ground for jurisdiction in chancery; and the proceedings, once properly begun there, will be continued when important facts are thus disclosed, and the subject in controversy is one proper for chancery, as well as a court of law. *Foster v. Swasey*, 2 Woodb. & M. 217.

6. (Sept., 1851.) A bill of discovery will not be allowed in any case where the discovery will subject the defendant to a penalty, unless the bill relinquishes all claim to the penalty. *Finch v. Rikeman*, 2 Blatchf. 301.

7. (May, 1852.) A defendant in a suit in equity founded on the infringement of a patent cannot, by a cross-bill which sets up no color of title in himself, demand a discovery from the plaintiff in the original suit, as to the source or validity of his title. *Young v. Colt*, 2 Blatchf. 373.

8. It is essential to a bill of discovery that it should set forth a title sufficient to support or defend a suit, and pray a discovery pertinent to that title, and nothing beyond. *Ib.*

9. And, where it cannot be sustained as a bill of discovery, it

cannot be retained for the purpose of relief, unless it makes a case for relief independently of the discovery sought. *Ib.*

10. (May, 1868.) Where a bill, founded on the alleged infringement of a patent, contained no special allegation that a discovery was necessary, and had no special interrogatories annexed to it, but contained the usual general prayer for an answer on oath, and a prayer for an account of profits, and it was demurred to on the ground that the court had no jurisdiction of the case made by the bill, because it did not pray for either a discovery or an injunction,—*Held*, that, under the ninety-third rule in equity, the bill was a bill for a discovery and account, and that the demurrer must be overruled. *Perry v. Corning*, 6 Blatchf. 134.

11. The admission of the counsel for the plaintiff, on the argument of the demurrer, that a discovery was not necessary, and that he did not seek a discovery, disregarded. *Ib.*

12. Whether the bill could be sustained as a bill for an account alone, *quære*. *Ib.*

13. (Jan., 1877.) Where a bill is brought for a discovery and for other equitable relief, within the appropriate jurisdiction of a court of equity, and the ultimate object of the plaintiff is to obtain damages, the court, having granted a discovery, will proceed and give the proper relief in damages, and not compel the plaintiff to undergo the delays and expenses of a suit at law. *Magic Ruffle Co. v. Elm City Co.*, 14 Blatchf. 109.

14. Where a bill is brought for a discovery, in a case which is not the proper subject of an action or bill for an account, the fact that the plaintiff is entitled to a discovery does not necessarily entitle him also to an account. *Ib.*

15. But if the relief to be ultimately rendered is the payment of damages, and a discovery is needed, and the ascertainment of damages is complicated and intricate, and the action at law cannot be adequately tried without great difficulty, then, although the case is not one of trusteeship or agency, a court of equity will assume jurisdiction of the whole case and proceed to a final decree on the merits. *Ib.*

16. (May, 1879.) A bill without interrogatories, under the amendment to Rule 40 in equity, made at the December Term, 1850, and which prays only for a disclosure of gains and profits from infringement, is not a bill of discovery. *Gordon v. Anthony*, 16 Blatchf. 234.

17. The case of *Stevens v. Gladding* (17 How. 455) examined and explained. *Ib.*

18. (Oct., 1807.) The bill cannot be supported as a bill of discovery, because the plaintiff does not state that he relies on the discovery to be obtained from the defendant, but that he can prove the mistakes of the arbitrators. *Hurst v. Hurst*, 2 Wash. 127.

19. (April, 1871.) If evidence of defendant's title furnishes evidence of the complainant's, the latter may compel a discovery of it. *Gaines v. Mausseaux et al.*, 1 Woods, 118.

20. The fact that in Louisiana titles are registered in a public office does not affect complainant's right to call for such discovery. *Ib.*

21. (April, 1871.) Where several persons are liable for the same debt, each one is entitled to know what amount of money the creditor has received; and for such purpose may cite the creditor to a discovery, by complying with the rules in such cases. Should the creditor refuse to make the disclosure, he will be liable to the costs of a bill of discovery. *Molyneaux's Adm'r v. Marsh*, 1 Woods, 452.

22. (Oct., 1841.) The law of this state [Michigan] which authorizes a judgment creditor, after return of execution, no property found, to file his bill for a discovery, and subject the choses in action and equitable credits of the defendant to the payment of this judgment, may be enforced by an exercise of the chancery powers of the Circuit Court. *Lorman v. Clarke*, 2 McLean, 568.

23. There being no adequate remedy under the statute, at law, this court will give relief in equity. *Ib.*

24. (June, 1845.) In a bill of discovery to aid a prosecution at law, the bill should aver the materiality of the facts, and that they can only be proved by the oath of the defendant. *Bell v. Pomeroy*, 4 McLean, 57.

25. (April, 1857.) The defendant, after judgment in ejectment and new trial allowed, cannot maintain a bill for discovery whether the conveyance to plaintiff was not merely colorable, and made in order to give this court jurisdiction. *Richardson v. Mattison*, 5 Biss. 31.

26. *It seems* that the proper practice is, to move for leave to file a plea in abatement, supported by affidavit showing that

plaintiff, at the time he went to trial on the merits, did not know the facts concerning the alleged colorable conveyance. *Ib.*

Bill of Interpleader.

1. (March, 1846.) Upon the general principles of equity jurisprudence, a bank may, in a proper case, have relief by bill of interpleader, against separate and adversary parties who claim title to moneys therein deposited. *City Bank v. Skelton*, 2 Blatchf. 14.

2. (March, 1880.) Where a bank holds a fund, to which claim is made by several parties, and where such bank, by bill of interpleader, asks a court of equity to determine the disposition of such fund as between the adversary claimants, the court will consider the equities as they exist between such claimants, and in such a case the rule that protects a bank from being harassed by suits by check-holders has no application. *German Savings Institution v. Adae*, 1 McCrary, 501.

Bills. Multifariousness.

1. (Jan., 1844.) It is impossible to lay down any general rule as to what constitutes multifariousness in a bill in equity. Every case must be governed by its own circumstances, and the court must exercise a sound discretion. *Gaines v. Chew*, 2 How. 619.

2. A bill filed against the executors of an estate, and all those who purchased from them, is not, upon that account alone, multifarious. *Ib.*

3. (Jan., 1845.) Whether a bill in equity is open to the objection of multifariousness or not must be decided upon all the circumstances of the particular case. No general rule can be laid down upon the subject; and much must be left to the discretion of the court. *Oliver v. Piatt*, 3 How. 333.

4. The objection of multifariousness can be taken by a party to the bill, only by demurrer, or plea, or answer, and cannot be taken at the hearing of the cause. But the court itself may take the objection at any time, — at the hearing or otherwise. The objection cannot be taken by a party in the appellate court. *Ib.*

5. (Jan., 1847.) An objection that a bill is multifarious must be made before answer, and can be tested only by the structure of the bill itself. *Nelson v. Hill*, 5 How. 127.

6. Where there were two mercantile firms, and some of the members common to both, a creditor's bill was not multifarious when filed against the personal representatives of two of the deceased partners of the two firms, and also against the surviving partner of one of the firms. *Ib.*

7. (Dec., 1868.) A bill involving but a single matter, and affecting all defendants alike, is not multifarious, although it may seek both to open settlements and to cancel receipts as fraudulent. *Payne v. Hook*, 7 Wall. 426.

8. (Oct., 1876.) The principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or the proofs, or both, all the grounds upon which he expects a judgment in his favor, and is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail, does not require distinct causes of action; that is to say, distinct matters, each of which would authorize, by itself, independent relief, to be presented in a single suit, though they exist at the same time, and might be considered together. *Stark v. Starr*, 4 Otto, 477.

9. (Oct., 1877.) A bill of foreclosure is bad for misjoinder of parties and for multifariousness, where persons are made defendants thereto, who claim title adversely to the mortgagor and the complainant, and the latter seeks in that suit to litigate and settle his rights. *Dial v. Reynolds*, 6 Otto, 340.

10. (Nov., 1820.) A bill cannot be sustained in equity which is multifarious and embraces distinct matters, affecting distinct parties, who have no common interest in the distinct matters. *West v. Randall*, 2 Mason, 181.

11. (Oct., 1859.) A bill in equity, founded upon four patents for improvements in reaping-machines, they being improvements intended to be used in all such machines, and not limited to any particular machine, and not being necessarily connected together in use, is not bad for multifariousness, on demurrer, where it appears that the machine used contains all the improvements. *Nourse v. Allen*, 4 Blatchf. 376.

12. A deduction of title to the patents being set forth in the bill, with an averment that the title to them was vested in the plaintiffs, — *Held*, that the latter averment would have been sufficient, and that the deduction of title was unnecessary: *Ib.*

13. (Jan., 1879.) A bill in equity on two patents alleged that the defendant was using machines containing, in one and the same apparatus, the inventions secured by each of the two patents. The defendant demurred, on the ground that the bill did not allege that the devices were used conjointly or connected together in any one apparatus. *Held*, that the demurrer must be overruled. *Horman Patent Mfg. Co. v. Brooklyn City Railroad Co.*, 15 Blatchf. 444.

14. Equity permits the joinder of several causes of action in a single bill, but not when the effect would be to embarrass the defendant, or introduce unnecessary confusion. *Ib.*

15. (Jan., 1880.) G., trustee under the will of J., of property, to receive its profits, and pay the same to B. during his life, with remainder over to the plaintiffs, turned over the property absolutely to B., who lost it. The plaintiffs brought this suit against L., the executrix of G., claiming not only that she had assets belonging to the estate of G., but that G. had conveyed to her, she being then his wife, without consideration, property of his own, more than was a reasonable provision for her in view of his violation of said trust, and probably intending to defeat such liability, which she understood. *Held*, that, in addition to responding for the assets of the estate, she must respond, and in this suit, for the property so conveyed to her.

The whole claim is one against the estate of G., in her hands as executrix, and the bill is not multifarious. *Beatty v. Hinckley*, 17 Blatchf. 398.

16. (April, 1871.) A bill is not objectionable for multifariousness, because it joins defendants holding distinct tracts of land, under distinct conveyances, if the main ground of defense is common to all the defendants. *Gaines v. Mauseaux et al.*, 1 Woods, 118.

17. (Nov., 1872.) A bill which united a controversy raised by the heirs of testatrix touching the validity of the bequests in the will, with the claims of the heirs of the husband of testatrix to the property bequeathed by the will, and with the suit of a creditor seeking judgment against the succession, and with a de-

mand for an account to be rendered by the executor, was held to be multifarious. *Haines v. Carpenter*, 1 Woods, 262.

18. Courts of equity will not allow a multifarious bill as a remedy for a multiplicity of suits. *Ib.*

19. (Nov., 1875.) An alternative prayer does not necessarily make a bill multifarious. *Kilgour v. Gas Light Co.*, 2 Woods, 145.

20. (June, 1861.) A bill in equity praying that the equitable title to land may be adjudged to be in the complainant, and that he is entitled to a patent, and also that a certain person may be made a defendant to the bill and may be compelled to disclose the nature of his claim to the land, and by what authority he is in possession, and to account for rents and profits, is liable to the objection of multifariousness in seeking to obtain two distinct objects by the same decree. *Copen v. Flesher*, 1 Bond, 440.

21. (July, 1844.) There is no absolute rule in regard to the multifariousness of a bill. The decisions on this point are unsatisfactory and contradictory. The rule is founded on convenience, and must be applied to the peculiar circumstances of each case. *M'Lean v. Lafayette Bank*, 3 McLean, 415.

22. (June, 1852.) A bill is not multifarious where it does not unite titles which have no analogy to each other, whereby the defendant's litigation and costs are increased. *Turner v. American Baptist Missionary Union*, 5 McLean, 345.

23. (July, 1858.) It is not indispensable that a bill for an injunction should contain a prayer for discovery. *Lawrence v. Bowman*, McAll. 419.

24. (Dec., 1874.) Where two separate patents, for improvements in the manufacture of brooms, owned by the complainant, are alleged to have been infringed by the defendant, and the broom manufactured by the defendant appears to be an infringement of both patents, the bill is not bad for multifariousness. *Gillespie v. Cummings*, 3 Sawyer, 259.

25. Where the right to both patents alleged to be infringed for the State of California has been assigned to complainant, the bill is not bad for multifariousness, because the assignment of one of the patents also embraces other territory than the State of California. *Ib.*

26. (July, 1879.) Parties having distinct claims against the same defendant cannot maintain a suit thereon jointly; and a bill

containing two or more such claims is multifarious. *Baker v. City of Portland*, 5 Sawyer, 566.

Bills. Verifying.

1. (May, 1847.) The omission to make oath to a bill in chancery, praying for an injunction, is not here a cause of demurrer, after a hearing and order to file evidence. But it should be objected to by motion when the respondents appear; and the oath will then be directed, unless good cause is shown to the contrary. There is no rule of the court requiring an oath to be filed with the bill. *Woodworth v. Edwards*, 3 Woodb. & M. 120.

2. (Jan., 1868.) It is not necessary that the bill [of complaint] should, in such case [where the owner of the legal title to a patent and the party immediately injured are joined as plaintiffs in a suit in equity], be verified by the owner of the legal title, if it is verified by his co-plaintiff. *Goodyear v. Allyn*, 6 Blatchf. 34.

Rule 21. — Confederacy Clause, Charging Part, and Jurisdiction Clause, Stating Part. Prayer of Bill.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

1. (Feb., 1795.) Where there is a prayer for general relief, it is sufficient to warrant the court in giving damages, though

damages are not expressly prayed for. *Penhallow v. Doane*, 3 Dall. 86, 87, 103, 118.

2. (Jan., 1850.) A prayer for general relief in this case covers and includes a prayer for specific performance. *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390.

3. (Dec., 1874.) Where there is a prayer for general relief, a court of equity may afford such relief as the averments of the bill and the proofs warrant, although the complainant may not be entitled to the relief specifically prayed for. *Moore v. Mitchell*, 2 Woods, 483.

Rule 22. — Bill to aver Reason why others are not made Parties, &c. Prayer.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

1. (July, 1855.) Where one [a necessary party] is out of the jurisdiction of the court, the fact should be made to appear in the pleadings; and it should be prayed that he be made a party should he come within the jurisdiction of the court. *Tobin v. Walkinshaw*, McAll. 26.

Rule 23. — Prayer for Process.

The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

Rule 24. — Signature to Bill by Counsel.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

1. (Oct., 1842.) A bill must be signed by counsel, or it is demurrable. But a signing on the back of the bill is sufficient. *Dwight v. Humphreys*, 3 McLean, 104.

Rule 25. — Costs of Bill or Answer.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the state court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

Rule 26. — Scandal and Impertinence in Bills.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

Rule 27. — Exceptions for Scandal or Impertinence.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions

shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.

1. (May, 1834.) Where an exception to the jurisdiction was taken in the answer, it was properly struck out, on reference to a master, for impertinence. *Wood v. Mann*, 1 Sumn. 579.

2. Impertinences are any matters not pertinent to those points which are properly before the court for decision at any particular stage of a cause. *Ib.*

3. (Oct., 1843.) Where, in the answer to a bill in equity, an allegation was made impeaching the *bona fides* and validity of a codicil to a will, which had been already approved and allowed by a court having competent and exclusive jurisdiction over the probate thereof, it was ordered that the allegation be expunged as being impertinent and immaterial. *Langdon v. Goddard*, 3 Story, 13.

4. Where also there was an allegation in the answer, setting up an attempted settlement by the defendant with the plaintiffs, of the nature and terms of which no account was given, and which was never acceded to by the plaintiffs, it was ordered to be expunged as immaterial and irrelevant. *Ib.*

5. (April, 1825.) On exceptions to an answer for impertinence and scandal, courts of equity give the answer a liberal consideration, having regard to the nature of the case made by the bill. *Griswold v. Hill*, 1 Paine, 390.

6. (June, 1847.) If an amendatory answer repeat what was said in the answer filed before, without varying the defense, it may be considered as impertinent, and will be referred to a master, &c. *Gier v. Gregg & Wald*, 4 McLean, 202.

7. (Jan., 1861.) Where an answer to a bill in equity is excepted to for impertinence, if the matter excepted to be in response to the bill, the exception will not be allowed though the matter be impertinent. *Lownsdale v. City of Portland*, Deady, 2.

8. (Jan., 1865.) Exceptions to an answer in equity for impertinence are only allowed where it is apparent that the

matter excepted to is not material or relevant, or is stated with needless prolixity. *Chapman v. School District*, Deady, 108.

9. An allegation in an answer, however evasive or insufficient, which is responsive to the bill, is not liable to exception for impertinence. *Ib.*

10. A defendant in a suit in equity cannot, by means of his answer, obtain any relief concerning the subject-matter of the suit; and a prayer therefor in such answer is impertinent. *Ib.*

11. An exception for impertinence must be allowed in whole or not at all. *Ib.*

Rule 28.— Amendment of Bills, of course, &c.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterward, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

Rule 29.— Amendment of Bill after Answer, Plea, Demurrer, or Replication.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been

sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

1. (Jan., 1831.) In the original bill filed by the United States in the Circuit Court of Rhode Island, the claim of the United States to payment of a debt due to them was asserted on the ground of an assignment made to the United States by an insolvent debtor, who was discharged from imprisonment on the condition that he should make such an assignment. The debtor had been previously discharged under the insolvent law of Rhode Island, and made, on such discharge, a general assignment for the benefit of his creditors. Afterwards an amended bill was filed, in which the claim of the United States was placed upon the priority given to the United States by the act of Congress against their debtors who have become insolvent. It was objected that the United States could not change the ground of their claim, but must rest it, as presented by the original bill, on the special assignment made to them. **BY THE COURT:** It is true, as the defendant insists, that the original bill still remains on the record, and forms a part of the case. But the amendment presents a new state of facts, which it was competent for the complainants to do; and on the hearing they may rely on the whole case made in the bill, or may abandon some of the special prayers it contains. *Hunter v. United States*, 5 Pet. 173.

2. (Jan., 1836.) After a case has been dismissed for want of jurisdiction, the pleadings having been technically defective, the court will not, at a subsequent term, allow them to be amended and the case to be reinstated on the docket. It would be, in effect, a reversal of the former decree, after the case had been finally disposed of in this court. *Jackson v. Ashton*, 10 Pet. 480.

3. There will be no difficulty in making the amendment in the Circuit Court in such a case, if that court shall see fit, in its discretion, to allow it to be done, and the cause may then be reheard there; and on a decree, newly rendered, may be brought up on appeal to this court; or a decree may be there rendered, by consent of parties, in order to bring up the case without delay. *Ib.*

4. (Jan., 1847.) Although the bill made no distinction between the two characters in which the executor acted, namely, as executor proper, and as executor having a power coupled

with a trust, yet, as no objection was taken in the court below upon this ground, this court does not think that an amendment is imperatively necessary. The material facts are alleged, upon which the claim rests. *Taylor v. Benham*, 5 How. 234.

5. (Dec., 1850.) The bill below must be dismissed, unless it be so amended as to include all the parties interested, and be confined to a claim for the surplus of the proceeds of the lands, after paying reasonable expenses and legal claims. *Gratz v. Cohen*, 11 How. 1.

6. (Dec., 1851.) The creditor cannot now charge fraud in his debtor. It is not charged in the bill; and although he may not have known of the agreement when the bill was framed, yet, when the answer came in, he might have amended his bill, and charged fraud. *Very v. Levy*, 13 How. 345.

7. (Dec., 1869.) In the absence of obligatory rules of court to the contrary, a court of equity, after a cause has been heard and a case for relief made out, but not the case disclosed by the bill, has power to allow an amendment of the pleadings on terms that the party not in fault has no reasonable ground to object to. *Neale v. Neales*, 9 Wall. 1.

8. And this amendment will be allowed on a bill for specific performance where the subject-matter and general purpose of both bills is the same, and the contract, consideration, promise, and acts of part performance stated in the amended bill are stated with sufficient precision, and are supported by proofs taken under the original bill, which entitle the complainants to the relief which they seek. *Id.*

9. (Oct., 1874.) An amendment which changed the character of a bill, allowed even after final decree, the circumstances being peculiar, and the cause having been in fact tried exactly as it would have been if the bill had originally been in the amended form. *The Tremolo Patent*, 23 Wall. 518.

10. (Oct., 1833.) The bill charged notice of the asserted fraud, against one of the defendants, in general terms, to wit, "that the defendant then and there well knowing all and singular the premises," &c. *Held*, that the bill should be amended so as to charge the notice more directly. *Wood v. Mann*, 1 Sumn. 507.

11. (May, 1845.) The court may, for the purpose of avoiding unnecessary delays, entertain a motion to amend a bill in equity at the same time that exceptions thereto are filed; and may

require the defendants to answer the amended matter and the exceptions together. *Kittredge v. Claremont Bank*, 3 Story, 590.

12. (May, 1855.) A., a patentee, filed a bill against B. for infringement of his patent, and prayed an injunction, which was granted. A. afterwards moved for leave to amend his bill by adding C. as plaintiff, and by averring that, under an agreement between A. and C., still in force, C. was the owner of the exclusive right under the patent to make and sell the articles as to which B. had infringed, and that B. had notice of the agreement before he infringed. *Held*, that the amendments could not be allowed, and that they would amount, in effect, to the institution of a new and materially different suit, both as to plaintiffs and rights of action. *Goodyear v. Bourn*, 3 Blatchf. 266.

13. (April, 1871.) The bill, in this case, was allowed to be amended by striking out the name of a person improperly joined as plaintiff. *Heath v. Erie Railway Co.*, 8 Blatchf. 348.

14. (Sept., 1872.) Motion to amend a bill of complaint denied. *Rumford Chemical Works v. Laner*, 10 Blatchf. 123.

15. (Feb., 1873.) On final hearing, the court announced that, on the pleadings and proofs, as they stood, it was impossible to grant to the plaintiff the relief prayed for. The plaintiff then moved for leave to amend the bill. It appearing that by making the amendments proposed, the bill and answer would agree in their statements, in the particulars covered by such amendments; that the evidence and the answer made out a case for relief to the plaintiff, but a case different from the one stated in the bill; that the purposes of substantial justice required that the amendments should be made; that the amendments did not change the subject-matter of the bill; and that no decree had been passed, — *Held*, that the motion ought to be granted on payment of costs. *Battle v. Mutual Life Ins. Co.*, 10 Blatchf. 417.

16. *Held*, also, that although some testimony on the part of the plaintiff might be in conflict with the amendments, yet, as the amendments harmonized with the allegations of the answer, and such testimony was not testimony sustaining the allegations of the answer, the point was immaterial. *Ib.*

17. The case of *Neale v. Neales* (9 Wall. 1) commented on, and held to warrant the allowance of such amendments. *Ib.*

18. (Dec., 1875.) A motion to amend a bill by adding new parties defendant, after replication filed and the production of

evidence, it appearing that the plaintiff was in a position to make the amendment before replication filed, refused. *Clifford v. Coleman*, 13 Blatchf. 210.

19. (April, 1818.) Where leave is given to amend the bill, it should state only so much of the original bill as may be necessary to introduce and to make intelligible the new matter, which should alone constitute the chief matter of the amended bill. *Peirce v. West's Executor*, 3 Wash. 354.

20. The amendment should be by a separate bill, and not by interlining the original bill. *Ib.*

21. The amended bill should call on the original defendants to answer the new matter, or on the new parties, if any, to answer both. *Ib.*

22. (Oct., 1821.) An amendment of a bill upon which an injunction has been granted before answer filed, particularly if filed within a short time after filing the original bill, will not affect the injunction granted on the original bill. *Read v. Consequa*, 4 Wash. 175.

23. (April, 1819.) Whenever an objection is made for want of parties, the court gives leave to amend and make proper parties. *Harrison v. Rowan*, 4 Wash. 202.

24. (Oct., 1830.) The averment of citizenship of a party may be added at any stage of the cause, if the amendment is moved for in a reasonable time after the defect is suggested. *Fisher v. Rutherford*, Baldw. 188.

25. The staleness of a demand or the want of proper parties is no objection to amending the bill. Where the refusal to amend will put the plaintiff out of court, and the defendant can avail himself of the matter on which he objects to the amendment, on appeal, the court will allow it. *Ib.*

26. (June, 1861.) Where such new matter [which has accrued since the filing of the original bill] is introduced in an amended bill, it is a cause of demurrer. *Copen v. Flesher*, 1 Bond, 441.

27. (Feb., 1866.) Where a defendant is sued as the sole owner of a railroad, and the proof is that he is jointly concerned with others as a stockholder, the allegation of ownership is material, and unless the bill is amended, no decree can be entered against the defendant. *Beard v. Bowler*, 2 Bond, 13.

28. (July, 1839.) Where a bill is amended, process need not

be issued against the defendants who are in court. *Longworth v. Taylor*, 1 McLean, 514.

29. Being in court, they have notice of the amendment, and are subject to the orders of the court. *Ib.*

30. (June, 1845.) Where the exception is taken [to want of an averment of citizenship, or where it is falsely alleged], the court will permit an amendment. *Hilliard v. Brevoort*, 4 McLean, 25.

31. (April, 1855.) By the twenty-ninth rule, a bill is not amendable after replication filed, unless the plaintiff shows that "the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced." *Ross v. Carpenter*, 6 McLean, 382.

32. If the amendment asked for is the introduction of a new party to the bill, whose interest was known to the original plaintiffs or their agent, when the bill was filed, the amendment will not be allowed. *Ib.*

33. As the twenty-ninth rule makes no provision for an amendment of the bill after the cause is at issue and depositions have been taken and filed, it may fairly be construed as prohibiting it. If granted, it must be under very special circumstances. *Ib.*

34. (May, 1869.) The general rule is that matters existing at the time of filing the bill, but omitted therefrom, and appearing necessary to the case, should be brought before the court by amendment. *Swatzel v. Arnold*, Woolw. 383.

35. Matters pertinent to the case, arising after the bill is filed, should be brought before the court by way of supplement. *Ib.*

36. Before answer, it is in some cases admissible to charge matters arising after filing the bill, by way of amendment, instead of by supplement. *Ib.*

Rule 30. — Amendment of Bill, after Order allowing it.

If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

**Rule 31. — Demurrers and Pleas. Certificate of Counsel.
Affidavit.**

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact.

1. (May, 1868.) Where, in a suit in equity, a plea to the bill is filed, unaccompanied by any certificate of counsel, or any affidavit of the party, as required by the thirty-first equity rule, and the plaintiff, instead of disregarding the plea, or moving to take it from the files, or setting it down for argument, files a demurrer to it, and the cause is then regularly brought to argument, on the question of the sufficiency of the plea, the want of the certificate and affidavit must be regarded as waived by the plaintiff. *Good-year v. Toby*, 6 Blatchf. 130.

Rule 32. — Demurrer or Plea to Bill. Answer to Part.

The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

Demurrer. Various Causes. Equity.

1. (Jan., 1848.) Where fraud is alleged in a bill, and relief is prayed against a judgment and a judicial sale of property, a demurrer to the bill, that relief can be had at law, is not sustainable. *Shelton v. Tiffin*, 6 How. 163.

2. (Dec., 1862.) Where it appears on the face of a bill that an agreement concerning an interest in lands, set up by complainant, is in parol, the defense of the Statute of Frauds may be taken advantage of on demurrer. *Randall v. Howard*, 2 Black, 585.

3. (Oct., 1874.) When a bill by a widow, claiming real estate, alleges that certain persons named, being several in number, all claim through a deed made by her during coverture, which

deed, the bill alleges, was void for want of her free consent in making it, no demurrer lies to the bill on the ground that the defendants were improperly joined, inasmuch as they had separate and distinct interests which could not be joined in one suit. *House v. Mullen*, 22 Wall. 42.

4. (Oct., 1846.) A demurrer in part to a bill, followed by an answer as to the rest, is not thus overruled or withdrawn by the rules of the court here, though it might be in England. And the rules of the court in that respect do not violate any law as to private rights, but merely change the practice of the court. *Pierpont v. Fowle*, 2 Woodb. & M. 23.

5. (Oct., 1846.) When redress is sought in chancery it cannot be granted in the courts of the United States, however it may be in England or in the States, if the redress is in every way as full and appropriate at law. This objection may be taken on demurrer, when it appears on the face of the bill, but is not too late at the hearing, if, after an answer, no disclosure is obtained. *Foster v. Swasey*, 2 Woodb. & M. 217.

6. (Oct., 1873.) A bill in equity is not demurrable on the ground of a plain, adequate, and complete remedy at law, when it appears that the remedy at law can only be prosecuted by means of a large number of actions, involving many questions of values and accounts, which it would be practically impossible for a jury to settle. *Plummer v. Conn. Mutual Life Ins. Co.*, 1 Holmes, 267.

7. (April, 1826.) An objection to the equity of the bill, which might have been taken advantage of on demurrer, is not favorably received at the hearing of the cause, after answer. *United States v. Sturges*, 1 Paine, 526.

8. (Dec., 1846.) A special demurrer to a bill in equity is insufficient, unless it points out specifically, by paragraph, page, or folio, or other method of reference, the parts of the bill to which it is intended to apply. *Atwill v. Ferrett*, 2 Blatchf. 39.

9. Where an action at law for the infringement of a copyright was brought against G., and then the plaintiff filed a bill in equity against G., F., and A., charging them, as copartners, with having committed the acts for which G. was sued at law, and seeking a discovery from all of them in aid of the suit at law, — *Held*, that G. could not, by demurrer, object to the bill as multifarious in respect of his co-defendants, especially as it

appeared by the bill that they resided out of the jurisdiction of the court. *Ib.*

10. A general demurrer to the whole bill must be overruled, if any independent part of the bill is sufficient. *Ib.*

11. Nor will a formal protestation accompanying the demurrer avoid the force of the rule. *Ib.*

12. (March, 1870.) Where a bill in equity, for the infringement of a patent, prays for a discovery and an account of profits, and alleges that the plaintiff has no adequate remedy except in equity, it is not demurrable on the ground that the plaintiff has an adequate remedy at law. *Perry v. Corning*, 7 Blatchf. 195.

13. (April, 1871.) If a demurrer to a bill in equity covers the whole bill, when it is good to a part only, it will be overruled. *Heath v. Erie Railway Co.*, 8 Blatchf. 348.

14. A general demurrer to the whole bill cannot be sustained as a demurrer to relief prayed in respect of persons who are not made parties to the bill. *Ib.*

15. The tender of the waiver [of answer on oath to a bill of complaint] is no ground of demurrer to the bill. *Ib.*

16. (Aug., 1874.) Where the bill of complaint, on its face, shows want of jurisdiction, the appropriate mode of raising the objection is by demurrer, though there are precedents for a summary motion to dismiss the bill on that ground. *Pond v. Vermont Valley Railroad Co.*, 12 Blatchf. 282.

17. (Jan., 1878.) Where a demurrer to the whole of a bill sets up that some of the relief prayed is not cognizable in equity, it will be overruled, if some of the relief prayed is properly prayed. *Brandon Mfg. Co. v. Prime*, 14 Blatchf. 371.

18. (Nov., 1879.) A bill in equity being maintainable in some respects, a demurrer to the whole bill was overruled. *Perry v. Littlefield*, 17 Blatchf. 273.

19. (May, 1880.) Three corporations, not parties to the suit, set forth by petition that they apprehended they might be sued by the plaintiffs for infringing the patent, and, for reasons assigned, asked to have provisions inserted in the interlocutory decree to be entered in the suit, which would limit it so as not to affect them in any future suit. On demurrer to the petition,—*Held*, that the demurrer must be sustained, because the petition asked to have a construction given to the patent which did not arise out of any matters in issue in this suit, and that the matters

raised would be available to the petitioners in any suits against them on the patent. *Page v. The Holmes Burglar Alarm Telegraph Co.*, 18 Blatchf. 118.

20. (Nov., 1880.) A bill in equity was filed for the infringement of six patents containing thirty-eight claims in all. It did not allege that any two or more of the patents were in fact, or were capable of being, used in making a single structure, or that the defendants had so used them. The defendant demurred to the whole bill, and at the same time put in an answer to the whole bill. The demurrer showed that it was intended to be a demurrer for misjoining causes of suit against the defendant, though much of it was taken from the form of a demurrer for misjoinder of parties. It alleged, however, that the bill was brought for several causes, "distinct one from the other," and "not alleged to be conjointly infringed by the defendant." *Held*, that the demurrer must be sustained. *Hayes v. Dayton*, 18 Blatchf. 420.

21. The plaintiff, instead of moving to strike out either the demurrer or the answer, or to compel the defendant to elect which he would abide by, went to argument on the demurrer. *Held*, that he thereby waived any right to object that, under Rule 32 in equity, the answer was a waiver of the demurrer; and that Rule 37 in equity also prevented his making such objection on the argument of the demurrer. *Ib.*

22. (Oct., 1806.) If a bill in equity contain no ground for relief, the defendant ought to demur. *Executors of Gallagher v. Roberts*, 1 Wash. 320.

23. (Nov., 1871.) Where want of jurisdiction appears upon the face of the bill, the objection should be taken by demurrer. *Noyes v. Willard*, 1 Woods, 187.

24. (Nov., 1875.) If process is prayed against all the necessary parties to a bill, a demurrer to the bill for want of proper parties will not lie, on the ground that some have not been served. *Kilgour v. Gas Light Co.*, 2 Woods, 145.

25. (April, 1872.) It is not a good ground of demurrer, that the bill does not waive the forfeitures and penalties prescribed for the infringement. *Farmer v. Calvert Lithographing, &c. Co.*, 1 Flipp. 228.

26. (May, 1844.) A demurrer to a bill which contains allegations of fraud and strong circumstances of equity must be over-

ruled. In such a case the defendants must answer to the fraud. *Burnley v. Town of Jeffersonville*, 3 McLean, 336.

27. (June, 1849.) A note being sent to the defendants to sign, for a debt acknowledged to be due, the defendants substituted a note for the same amount, dated on Sunday.

A bill of discovery was filed, in which the defendants were called to answer as to the above fact.

The defendants demurred, as the answer required would subject them to a penalty for a breach of the Sabbath. The court sustained the demurrer. *Stewart v. Drasha*, 4 McLean, 563.

28. Also, they sustained a demurrer to that part of the bill requiring the defendant Drasha to answer whether he was not a lawyer, and did not write the note. *Ib.*

29. (June, 1853.) A defective allegation of citizenship is a good ground of demurrer. *Ketchum v. Driggs & Cargill*, 6 McLean, 14.

30. (1870.) If one who has no interest in the subject-matter of the suit, or in the relief prayed, be joined as party plaintiff, the defect may be reached by a general demurrer for want of equity. *Hodge v. North Missouri Railroad*, 1 Dill. 104.

31. (Nov., 1878.) A demurrer for want of equity will not lie to a bill that is not deficient in substance, although for some technical reason, as lapse of time or want of jurisdiction in the court, the relief sought for cannot be attained in that suit. *Nicholas v. Murray*, 5 Sawyer, 320.

32. A demurrer, that a bill does not state facts sufficient to constitute a cause of suit, is unknown to chancery practice, and at most is nothing more than a general demurrer for want of equity. *Ib.*

Demurrer for Staleness. Equity.

1. (Jan., 1850.) Where, upon the case stated in the bill, the complainant is not entitled to relief, by reason of lapse of time and laches on his part, the defendant may demur. *Maxwell v. Kennedy*, 8 How. 210.

2. (Oct., 1879.) Where it appears by the complainant's bill that the remedy is barred by lapse of time; or that by reason of his laches he is not entitled to relief, the defendant may, by demurrer, avail himself of the objection. *National Bank v. Carpenter*, 11 Otto, 567.

3. (April, 1827.) Where a bill in equity states a case to which the act of limitation applies, without bringing it within some one of the savings, the defendant may take advantage of the bar by demurrer. *Wisner v. Barnet*, 4 Wash. 631.

4. (June, 1861.) A demurrer to a bill in equity will be sustained on the ground of the staleness of the claim of title set up to land, when it appears by the averments of the bill that the complainants have slept upon their rights from the year 1810 until the year 1859. *Copen v. Flesher*, 1 Bond, 440.

5. Where such complainants file an amended bill, alleging that for a long time after their rights accrued they were minors residing in different parts of the State of Virginia, and had no knowledge of their rights nor the location of the land until about the year 1841, and were unable, until some time after that year, to take any steps in the assertion of their rights, such allegations are sufficient to relieve the claim of title of staleness, and to put the complainants on proof of their allegations in that regard. *Ib.*

6. (July, 1869.) Courts of equity are reluctant to sustain a demurrer to a bill on the ground of staleness alone, unless it is such that the delay would bar an action at law on the same claim, or unless there is a strong analogy between the case in equity and a case at law on which a statute of limitation would operate. *Putnam v. City of New Albany*, 4 Biss. 365.

Demurrer admits Alleged Facts. Equity.

1. (Oct., 1874.) A demurrer to a bill in equity does not admit the correctness of averments as to the meaning of an instrument set forth in or annexed to the bill. *Dillon v. Barnard*, 21 Wall. 430.

2. (Oct., 1841.) The office of a demurrer to a bill in equity is to bring before the court the right to maintain a bill, admitting all its allegations to be true; and the court will not, therefore, examine *aliunde* what facts might or might not defeat it; for this is the office of an answer or plea. *Ocean Ins. Co. v. Fields*, 2 Story, 59.

3. (May, 1847.) After a special demurrer to a bill, the allegations of fact must, on the hearing of the demurrer, be considered as true. *Woodworth v. Edwards*, 3 Woodb. & M. 120.

4. (Oct., 1872.) Reasonable presumptions are admitted by a

demurrer, as well as matters expressly alleged. *Amory v. Lawrence*, 3 Cliff. 524.

5. (May, 1874.) Matters of fact were alleged in the bill, in this case, that would entitle the complainants to relief; and in such a case a demurrer is not a good defense; but, under all the circumstances, the court allowed the respondents to file an answer on the merits. *Gindrat v. Dane*, 4 Cliff. 261.

6. (Sept., 1874.) A demurrer to a bill in equity admits only facts well pleaded in the bill; not averments of conclusions of law, nor as to construction of documents, or parol agreements inconsistent with written agreements alleged in the bill. *Dillon v. Barnard*, 1 Holmes, 386.

7. (Oct., 1808.) Upon a demurrer to a bill, every part of the bill must be taken as true. *Pagan v. Sparks*, 2 Wash. 325.

8. (July, 1844.) The demurrer admits all the material allegations of the bill. *M'Lean v. Lafayette Bank*, 3 McLean, 415.

9. (July, 1846.) A demurrer to a bill, admitting the above facts [that the defendant assumed to act as agent, in redeeming land sold for taxes, and took title in his own name], is overruled and the defendant required to answer. *Schedda v. Sawyer*, 4 McLean, 181.

10. (July, 1856.) A demurrer admits the allegations of the bill, for the purposes of a motion on the bill and demurrer. *Bay-erque v. Cohen*, McAll. 113.

Demurrer to Plea. Equity.

1. (Feb., 1866.) A demurrer to a plea presents the question of the sufficiency of the bill as well as of the plea. *Beard v. Bowler*, 2 Bond, 13.

2. An objection to a plea, that it is defective in not responding to all the allegations of a bill, is not sustainable, for a plea may be either to the whole bill or to a part only. *Id.*

Speaking Demurrer. Equity.

1. (Jan., 1868.) A demurrer which states a fact not appearing on the face of the pleading demurred to is a speaking demurrer, and will be overruled. *Lamb v. Starr*, Deady, 350.

Demurrer. Equity. Decision.

1. (June, 1853.) A demurrer to a bill praying an injunction must be decided before a motion for the injunction can be heard. *Ketchum v. Driggs & Cargill*, 6 McLean, 13.

Pleas in Equity. Generally.

1. (May, 1869.) In a suit for infringement of letters-patent, the issue tendered by the responding party must be clear and unconditional. *Graham v. Mason*, 4 Cliff. 88.

2. The pleading, at law or in equity, in such cases, must be clear, single, and free from evasion. *Ib.*

3. More than one defense may be presented in an answer in equity; but each should be separately and clearly alleged, without condition or qualification. *Ib.*

4. (March, 1871.) Where the allegations of a plea to a bill in equity are qualified by a reference to a paper annexed to the plea, the plea must be read as if the paper were introduced, in its very terms, into the body of the plea. *Wheeler v. McCormick*, 8 Blatchf. 267.

5. It is irregular to file, without special leave of the court, two pleas to a bill in equity. *Ib.*

6. (April, 1808.) A plea in avoidance of, and not responsive to, the bill, stands for nothing as evidence of the facts stated in it. *Gernon v. Boccaline*, 2 Wash. 199.

7. (Oct., 1822.) What are the requisites to constitute a good plea in bar in equity. *Sims v. Lyle*, 4 Wash. 301.

8. (April, 1826.) A plea to a bill in equity may be good in part and not so in the whole; and the court will allow it as to so much of the bill as it is properly applicable to, unless it has the vice of duplicity in it. *Kirkpatrick v. White et al.*, 4 Wash. 595.

9. (Oct., 1855.) Domicile or citizenship, depending not only on the acts, but also on the intentions, of the party of whom it is averred, and so being often the predicate of nice legal distinctions, as well as of facts and intentions of which another may be cognizant, need not, in a dilatory plea, be sworn to as of knowledge, nor otherwise than of belief. *Ewing v. Blight*, 3 Wall. Jr. 134.

10. (April, 1871.) If a plea contain matter proper for a de-

murrer, for a plea in bar, for a plea in abatement, and for an answer, it is bad for duplicity. *Gaines v. Mausseaux et al.*, 1 Woods, 118.

11. (Nov., 1871.) Defendant in equity has no right as a matter of course to file more than one plea. But when great inconvenience might otherwise result, in a particular case, the court will sometimes, in its discretion, allow several pleas. *Noyes v. Willard*, 1 Woods, 187.

12. Where a defendant in equity has filed several pleas without leave of the court, he will be put to his election as to which he will stand upon. *Ib.*

13. In general, when a defendant insists by plea upon matter which is apparent on the face of the bill and might be taken advantage of by demurrer, the plea will not hold. *Ib.*

14. (Jan., 1868.) In equity a defendant is not entitled to plead more than one plea, without leave of the court, and such leave will only be given when the necessity therefor is obvious. *Lamb v. Starr*, Deady, 351.

15. (March, 1870.) Plea in equity, nature of, in bar and abatement, and where double allowed. *Newby v. Railway Co.*, 1 Sawyer, 63.

16. (Aug., 1875.) A plea to a bill in equity may be good in part and bad in part. *Wythe v. Palmer*, 3 Sawyer, 412.

Plea in Abatement, in Equity.

1. (Feb., 1805.) A want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court. *Milligan v. Milledge*, 3 Cranch, 220.

2. (Dec., 1854.) Where a bill in chancery avers that the defendant is a citizen of another state, this averment can only be impugned in a special plea to the jurisdiction of the court. The answer is not the proper place for it, under the thirty-third rule of equity practice established by this court. *Wickliffe v. Owings*, 17 How. 47.

3. (Dec., 1870.) A suit in chancery begun previously to the passage of the act (that a certain bridge "shall be a lawful structure, and shall be recognized and known as a post route"), praying injunction against building of the bridge, as a nuisance, is abated by such an act, though pleas and replication had been

filed, proofs taken, and the case ready for hearing. *The Clinton Bridge*, 10 Wall. 454.

4. (Oct., 1877.) The rule at law that the pendency of a former action between the same parties, for the same cause, is pleadable in abatement to a second action, provided the actions be in courts of the same state, holds in equity. *Insurance Co. v. Brune*, 6 Otto, 588.

5. The plea of a suit pending in equity, for the same cause, in a foreign jurisdiction, will not abate an action at law in a domestic tribunal, or authorize an injunction against prosecuting such action. *Ib.*

6. (Nov., 1812.) An alien enemy cannot sustain a suit in the courts of the United States. *Mumford v. Mumford*, 1 Gall. 366.

7. (Oct., 1827.) If the citizenship be properly averred, and the defendant means to deny the fact of citizenship, he must take the exception by way of plea, and cannot do it by general answer, for it is a preliminary inquiry. *Dodge v. Perkins*, 4 Mason, 435.

8. (June, 1832.) The abatement of a suit in equity is merely an interruption to the suit, suspending its progress until new parties are brought before the court. *Hoxie v. Carr*, 1 Sumn. 173.

9. (May, 1834.) The exception to the jurisdiction of the court, by a denial of the fact of citizenship, is of a preliminary nature, and must be taken by plea in abatement, and not by any general answer. *Wood v. Mann*, 1 Sumn. 578.

10. (May, 1840.) The question of the jurisdiction of the United States courts, as to parties, can only apply as between the very parties who, by a false allegation, are brought within their jurisdiction. If, therefore, one of several defendants admit that his citizenship is rightly described, so as to found the jurisdiction of the court against him, the other defendants have no right to interfere in the matter. *Harrison v. Urann*, 1 Story, 64.

11. Where a bill in equity was brought against several individuals, averring that all of them were citizens of Massachusetts, and two of the defendants put in a plea averring that their co-defendant was not a citizen of Massachusetts, it was *held* that the right to contradict this averment in the bill, in this respect, and thus to oust the jurisdiction of the court, was a personal privilege of that co-defendant, of which he alone was entitled to avail himself. *Ib.*

12. (Oct., 1843.) Where a bill was brought by the plaintiff as administrator, and the defendant pleaded that he was not administrator, inasmuch as he had not taken out administration in New Hampshire before filing this bill, — *Held*, that the plea was sufficient on general principles, and also that the statute of New Hampshire in relation to actions commenced by persons acting as administrators did not govern the rule of this court in equity, but was confined to suits at law, and was addressed only to the state courts. *Carter v. Treadwell*, 3 Story, 25.

13. *Held*, also, that the plaintiff might maintain a suit in the Circuit Court, as a citizen of Maine, in his character of administrator, if he took out letters of administration in New Hampshire. *Ib.*

14. (May, 1845.) Where, in the answer to a bill in equity, it was set forth that, as the plaintiff was a bankrupt, and his assignee was not made a party to the bill, the plaintiff was not entitled to relief, it was *held* that the objection of bankruptcy should have been taken *in limine*, by way of plea, and could not be insisted on to avoid exceptions taken by the plaintiff to the answer. *Kittredge v. Claremont Bank*, 3 Story, 590.

15. (Oct., 1864.) The Circuit Court has no discretionary power to stay a suit in equity brought therein, or to refuse jurisdiction, on the ground that a prior suit involving the same subject-matter, and between the same parties, is pending in the state court of the district where the Circuit Court is held. *Loring v. Marsh*, 2 Cliff. 311.

16. There are cases in which it has been held that the pendency of another suit between the same parties for the same matter, in another jurisdiction, may be pleaded in bar or in abatement to a second suit. *Ib.*

17. The rule in this circuit [Massachusetts] has always been that the pendency of another action for the same cause, in a state court, is not a good plea in abatement. *Ib.*

18. (May, 1866.) Certain persons in Massachusetts associated themselves together, prior to the filing of the bill in this case, by articles of agreement in writing, and formed a corporation by the name used in the bill of complaint, to manufacture and sell certain articles under letters-patent, which were by the inventor assigned to the company. It was contended that the associates were not a corporation under the Gen. Stat. Mass., ch. 61, p. 341.

The defense was not set up in the answer to the bill, but defendant gave notice of his intention to plead the same in bar of the suit. *Held*, that such defense must be pleaded in abatement, not in bar, and could not be put in under the general issue. *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. 555.

19. Corporations may have the same remedies, at law or in equity, as natural persons; and the general issue pleaded to a suit brought by the corporation is an admission of its corporate existence. *Ib.*

20. (April, 1825.) Plea to the jurisdiction [of the Circuit Court], by a bankrupt, on a bill filed by his creditors, to compel the assignee to account, overruled: *Lucas v. Morris*, 1 Paine, 396.

21. (April, 1853.) An objection for want of parties must be taken by plea or answer; and the name or description of the parties who should be brought before the court must be specified. Such an objection cannot be taken at the hearing for the first time. *Segee v. Thomas*, 3 Blatchf. 11.

22. (May, 1868.) To a bill against a single defendant, alleging the infringement of a patent, by sales by him of the patented article, a plea was filed alleging that the sales were not made by the defendant alone, but were made by him and another person named in the plea, — *Held*, that the plea was bad, because it did not allege that such other person was yet living and within the jurisdiction of the court. *Goodyear v. Toby*, 6 Blatchf. 130.

23. (June, 1870.) A plea to the jurisdiction of this court, alleging facts which show a want of jurisdiction, is not a submission to the jurisdiction. *Van Antwerp v. Hulburd*, 7 Blatchf. 426.

24. (March, 1871.) A bill in equity was filed by W., in a Circuit Court in Illinois, against C. and L., alleging the infringement by them, within the jurisdiction of that court, of a patent granted to W., and praying for an account and an injunction. Subsequently W. filed a bill in this court against the said C., alleging the infringement by him, within the jurisdiction of this court, since the filing of the previous bill in Illinois, of the same patent, and praying for an account and an injunction. To such bill in this court C. interposed a plea, setting up, in abatement, the pendency of such previous suit. *Held*, that the plea was bad. *Wheeler v. McCormick*, 8 Blatchf. 267.

25. The case of *Woodworth v. Stone* (3 Story, 749) commented on. *Ib.*

26. (Aug., 1874.) It is not a good plea by a defendant residing in Vermont, the state wherein the suit is brought by plaintiffs residing in Connecticut, that some of the defendants are citizens of New York and some of Massachusetts. *Pond v. Vermont Valley Railroad Co.*, 12 Blatchf. 282.

27. But where the bill shows apparent jurisdiction, and a defendant desires to contest its allegations, or show new matter in avoidance of that jurisdiction, he must do so by plea, and not by motion founded on affidavits; and when such defendant has appeared and answered to the merits, such motion will not be entertained. *Id.*

28. On final hearing, the court will see to it that it does not exceed its jurisdiction, where want of jurisdiction of the action appears; but parties must conform to the ordinary modes of placing on the record the defenses on which they rely, so that the court may pass upon the issues made by the record, and so that they may be the subject of review, should the record be sent to an appellate tribunal. *Id.*

29. (April, 1826.) Bill in equity by A., a citizen of New Jersey, against B. and the Leigh Coal and Navigation Company, an incorporated body. Plea to the jurisdiction, "that four of the corporators, naming them, were citizens of New Jersey." The plea was sustained, the corporators being the real defendants by their corporate name, and represented by their officers. *Kirkpatrick v. White et al.*, 4 Wash. 595.

30. (Oct., 1831.) An objection to jurisdiction for the want of parties, of equity in the bill, or of their being a remedy at law, need not be made by demurrer, plea, or in an answer; it may be made at the hearing, or on appeal. *Baker v. Biddle*, Baldw. 394.

31. (Oct., 1855.) It is not requisite in equity suits in the Third Circuit that a dilatory plea be filed within four days after the term to which the bill is filed. On the contrary, such a plea may be entered at any time before or on the next rule-day succeeding that of the defendant's appearance; there being no distinction in this respect between dilatory pleas and any other pleas. The case is different at law. *Ewing v. Blight*, 3 Wall. Jr. 134.

32. Where, in such suit, a plea is filed, though filed irregularly, the complainant cannot treat it as a nullity and take a decree *pro confesso*. Before taking such a decree in such a case, he should first obtain an order to set the plea aside, or to take it off the files as irregular. *Id.*

33. (May, 1871.) A plea to the jurisdiction of the court must be pleaded by itself, and cannot be set up in the answer under Rule 39, as an answer is an appearance and a waiver of a plea to the jurisdiction. *Vose v. Reed*, 1 Woods, 647.

34. (June, 1853.) A proceeding in a state court by attachment, where a garnishee is summoned, cannot be set up in bar or abatement to a creditor's bill. *Wilkinson v. Yale*, 6 McLean, 16.

35. (Jan., 1858.) Where a plea to the jurisdiction is interposed, the court will direct an argument of the plea to be made forthwith, and intermediately direct a temporary injunction to issue, to keep the parties *in statu quo* until the plea is disposed of. *Fremont v. Merced Mining Co.*, McAll. 267.

36. (Jan., 1865.) Matter in abatement of a suit in equity cannot be alleged by way of answer, but must be set up in a plea. *Chapman v. School District*, Deady, 109.

37. (Nov., 1878.) An objection to a bill, in which the complainant describes himself as assignee, that he is not legally such assignee, must be made by plea and not by demurrer. *Nicholas v. Murray*, 5 Sawyer, 320.

Plea in Bar, in Equity.

1. (Feb., 1805.) A plea in bar to a bill in chancery, denying only part of the material facts stated in the bill, is not good. A mere denial of facts is proper for an answer, but not for a plea. *Milligan v. Milledge*, 3 Cranch, 220.

2. (Feb., 1808.) If an account stated be pleaded in bar to a bill in equity, such plea will be sustained, except so far as the complainant shall show it to be erroneous. *Chappedelaine v. Dechenaux*, 4 Cranch, 305.

3. (Feb., 1821.) Under what circumstances a plea of a former judgment at law, for the cause of action, is a good bar in equity. *Hughes v. Blake*, 6 Wheat. 453.

4. (Oct., 1874.) Where, pending a bill in a federal court for the infringement of a patent, the parties have agreed to submit the question whether a machine made by the defendant was an infringement, to a solicitor of patents, and to abide by his decision, and that, if he decides that it is not, then that the bill in said suit shall stand dismissed; and the referee does decide that there is no infringement; but the complainant, instead of having

his original bill dismissed and filing a new original bill, files a supplemental bill alleging a surrender and reissue, and that the reissue is "for the same invention" as was secured by the original patent,—in such case, if it appear that the parties throughout the trial have treated the invention secured by the reissue as substantially the same invention as that secured by the original letter, and have raised no issue about exact specification, or any of those differences which may properly exist between a claim in an original patent and a claim in a reissue, but, on the contrary, have impliedly admitted substantial identity, having taken the issue on other matters, the matters, to wit, whether the complainant was not deceived when agreeing to refer, and whether the right of the referee to make any award was not legally revoked before any award was made by him, and whether, therefore, the award was not void,—in such case, if the court be satisfied that there was no deception, and that the award was made, and validly, then the plea of the award and agreement to be bound by it may be properly pleaded to the supplemental bill, as it might have been to the original one. *Reedy v. Scott*, 23 Wall. 352.

5. (Oct., 1878.) . . . *Held*, that the order of seizure and sale did not merge the debt, but that it was a judicial demand, continuing in operation until rendered effective by a valid sale of the property; and that the plea of prescription could not, therefore, be sustained. *Gordon v. Gilfoil*, 9 Otto, 168, 169.

6. (Oct., 1818.) Upon a hearing on an issue on a plea in bar to a bill in chancery, no question arises as to the sufficiency of the plea in point of law; it is only necessary to be proved in point of fact. *Hughes v. Blake*, 1 Mason, 515.

7. Under what circumstances a plea of a former judgment at law for the same cause of action is a good bar in equity. *Ib.*

8. (June, 1829.) Upon a bill of review for newly discovered evidence, the other party may controvert, by plea or answer, that it is newly discovered. *Dexter v. Arnold*, 5 Mason, 304.

9. (Oct., 1833.) Where a bill in equity was brought to set aside a conveyance asserted to have been procured by fraud, and one of the defendants pleaded that he was a *bona fide* purchaser, under the grantee, of parcel of the premises, without notice of the asserted fraud, and that he had paid a part of the consideration-money, and that the residue was secured by mortgage,—*Held*, that this plea furnished no bar to the bill; that it

should have averred that the whole consideration of the purchase had been paid before notice of the plaintiff's title. *Wood v. Mann*, 1 Sumn. 506.

10. The above plea overruled absolutely, and the party ordered to answer generally. *Ib.*

11. *Quære*: Whether a *bona fide* purchase for a valuable consideration, without notice, is a good bar in equity to a legal title asserted, as it is to an equitable title. *Ib.*

12. The following was the denial in the plea of the notice of the fraud asserted in the bill; namely, "that this defendant had no notice whatever of any title, claim, or demand of the complainant, or of any other person, to or in the lands so purchased by this defendant, as aforesaid, which would affect the same, or any of them, or any part thereof." *Held*, that this is argumentative and insufficient. It should expressly and in terms deny, by proper averments, notice of the fraud charged in the bill. *Ib.*

13. (Oct., 1846.) A plea in bankruptcy is not to be sustained against a claim in equity to rescind a contract like this, on the ground of fraud. *Smith v. Babcock*, 2 Woodb. & M. 247.

14. (Nov., 1864.) To a bill filed by the next of kin of a deceased person, against his administrator, for distribution of his estate, the administrator pleaded, in bar of the suit, the adjudication of a surrogate's court, determining that the administrator was the next of kin of the deceased, the adjudication being made on a contest between the administrator and the plaintiff, as to the grant of letters of administration. *Held*, that such adjudication was not conclusive on the question of distribution, and that the plea was bad. *Caujolle v. Ferrié*, 5 Blatchf. 225.

15. (Jan., 1878.) H., the owner of shares in the capital stock of a Connecticut corporation, filed a bill in equity against the president and the directors of the corporation, alleging acts of mismanagement and breach of trust on the part of the president and directors, and that the directors had sanctioned all such acts, and that a request to them to take proceedings for the relief of the stockholders would be useless. The bill prayed for the dissolution of the corporation, and for the distribution of its assets among its creditors and stockholders, and for such further relief as the case might require. The defendants put in a plea that, by the statutes of Connecticut, a court of equity could dissolve a corporation only under certain specified circumstances, which did

not exist in this case. *Held*, that the plea was good. *Hardon v. Newton*, 14 Blatchf. 376.

16. (May, 1880.) S., in a bill in equity against C. and I. and J., alleged that I. had assigned to him a particular patent, with others; that he had made a reassignment to I., by a contract which was not to include such particular patent; that if by construction it does, such result is due to the fraud of I.; that I. had assigned the patent to C.; and that he had obtained a decree against J. for an account of the profits for infringement. The bill prayed for a reformation of the reassignment, if it included the patent, and for a decree to the plaintiff of such profits. C. pleaded to the allegation of fraud that he was a *bona fide* purchaser of the patent from I., for a "good and valuable consideration, to wit, a certain sum of money then advanced and paid by him to her," without notice of the fraud. *Held*, that the plea was bad, for not setting forth the amount of the consideration in traversable form. *Secombe v. Campbell*, 18 Blatchf. 108.

17. (April, 1817.) In a suit for a specific performance of a parol agreement to convey lands, although the defendant answer and admit the agreement, he may, nevertheless, protect himself against a performance of it by pleading the Statute of Frauds. *Thompson v. Tod*, Pet. C. C. 380.

18. (Nov., 1825.) To avoid circuitry of action, a covenant may be pleaded as a release; but it must be a covenant between those parties only; and if it contains no words of release, it will not be construed such, unless it gives the covenantee a right of action which will precisely countervail that to which he is liable; and unless, too, it was the intention of the parties that the last instrument should defeat the first. *Garnett v. Macon*, 2 Brock. 185.

19. (April, 1872.) A plea which alleges just title, good faith, the requisite period of possession, and that possession continued peaceful and without interruption, sets out all the circumstances which the laws of Louisiana require to exist as the basis of a prescription. *Gaines v. Agnelly et al.*, 1 Woods, 239.

20. (April, 1868.) Where a bill in equity charges acts of fraud, and sets up, among other things, an agreement by a defendant to execute a mortgage of real estate, and avers a failure and refusal to execute such mortgage, such defendant cannot, by plea, aver the invalidity of such agreement as a parol agreement and

void under the Statute of Frauds, but will be required by answer to respond to the allegations of the bill. *Bailey v. Wright*, 2 Bond, 181.

21. The court will require all the facts to be presented to enable it to decide whether the plea of the Statute of Frauds will be available. *Ib.*

22. (Dec., 1837.) A plea in bar to a bill must be full and complete to every part of the bill, and the fraud charged must be denied by an answer filed in support of the plea. *Piatt v. Oliver*, 1 McLean, 295.

23. And if the plea does not set up a bar to every equitable allegation in the bill, it will be set aside. *Ib.*

24. In this respect the rule is the same in chancery as at law. *Ib.*

25. The defendants, in their answers, may insist on the same matters as might be, or have been, pleaded in bar. *Ib.*

26. Pleas in bar which seek to avoid the equity of the case are not to be favored. Great strictness in their form and substance is required. *Ib.*

27. (July, 1842.) There must be an answer denying the fraud charged in the bill in support of the plea. *Lewis v. Baird*, 3 McLean, 56.

28. The answer, being broader than the plea, overrules it. *Ib.*

29. Fraud must be denied in the plea as well as in the answer. *Ib.*

30. Where one defense is made by the plea, and another by the answer, the plea will be ordered to stand over for an answer. *Ib.*

31. (June, 1845.) It is no sufficient answer to a bill of discovery to aid a prosecution at law, to say that A. B. can prove the facts, where the person so referred to is interested. *Bell v. Pomeroy*, 4 McLean, 57.

32. The complainant cannot be compelled to rely upon the oath of an interested witness. He may require the oath of the defendant as to the facts. *Ib.*

33. There is a distinction between a bill for discovery merely, and one for discovery and relief. *Ib.*

34. The plea presented the issue, who was best acquainted with the facts of the case,—the defendant or other persons. Such an issue cannot be tried. *Ib.*

Plea in Bar, in Equity. Statute of Limitations, and Lapse of Time.

1. (Jan., 1850.) The sale being made on the 1st of January, 1836, but the fraud not discovered until 1840, and the bill being filed in 1841, there is no sufficient objection to relief, owing to lapse of time. *Veazie v. Williams*, 8 How. 134.

2. (Dec., 1850.) The absence of the complainant from the state, and the late discovery of the fraud, account for the delay and apparent laches in prosecuting his claim. *Hallett v. Collins*, 10 How. 174.

3. (Oct., 1875.) The Exchange Bank of Columbia, S. C., failed in February, 1865. In June, 1872, its creditors filed a bill in equity to enforce their claims against the stockholders, under a clause of the charter, which, "upon the failure of the bank," rendered them individually liable for any sum not exceeding double the value of their respective shares. The defense set up the Statute of Limitations of 1712, which requires actions upon the case, and actions of debt, grounded upon any contract without specialty, to be brought within four years. *Held*, that as the liability of the stockholders arose from their acceptance of the act creating the corporation, and their implied promises to fulfill its requirements, the proper remedy was an action upon the case; and that, as the statute barred such an action at law, it was also a good defense in equity. *Carrol v. Green*, 2 Otto, 509.

4. (Oct., 1876.) . . . *Held*, 3. That the defense of the Statute of Limitations not having been set up by plea or answer, the case in that aspect cannot be considered. *Sullivan v. Portland & Kennebec Railroad Co.*, 4 Otto, 807.

5. (Nov., 1820.) Effect of lapse of time in equity. *West v. Randall*, 2 Mason, 181.

6. (Oct., 1846.) Length of time, pleaded against the enforcement of a trust in real estate, would avail, if the trustee had been openly, publicly, and constantly in possession, and denying the trust during twenty years. *Hunter v. Town of Marlboro'*, 2 Woodb. & M. 168.

7. (Oct., 1846.) A delay of two years after the completion of a sale alleged to have been fraudulent, and of one year after the discovery of the fraud, was held not to bar a suit for a rescission of the sale. *Smith v. Babcock*, 2 Woodb. & M. 247.

8. (Sept., 1852.) Though lapse of time be not pleaded as a

bar, the judgment of the court will be influenced by delay, not accounted for, when the bill seeks to rescind a sale. *Fisher v. Boody*, 1 Curt. C. C. 206.

9. Lying by, and acquiescence, may be sufficient to induce the court to refuse to rescind a deed, though not pleaded as a bar. *Ib.*

10. (May, 1829.) An amendment of the original bill, as it asserts a new title, is considered, as it regards the Statute of Limitations, the filing of a new bill. Effect is given to the Statute of Limitations, there having been an adverse possession of twenty years, against the right asserted in the amended bill. *Holmes v. Trout*, 1 McLean, 1.

11. (Oct., 1866.) The Statute of Limitations of California applies as well to equitable as to legal remedies, being directed to the subject-matter, and not to the form of the proceeding, or the form in which it is presented. It would seem, therefore, that, where the objection is not raised by demurrer, parties claiming its bar should plead it, or insist upon it in their answer in equity suits as in actions at law. *Norton v. Meader*, 4 Sawyer, 603.

Rule 33.—Setting down Demurrer or Plea. Issue on Plea.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

1. (Oct., 1858.) When a plea to a bill in equity is set down for hearing under the thirteenth additional rule, without being replied to by the complainant, all the facts therein alleged, which are well pleaded, must be considered as admitted, for the purpose of determining whether the plea constitutes a sufficient answer to the suit. *Mellus v. Thompson*, 1 Cliff. 125.

2. (Oct., 1806.) If the plea be set down for argument by the complainant, without replying to it, the matter contained in it must be considered as true. *Executors of Gallagher v. Roberts*, 1 Wash. 320.

Rule 34. — Costs on Plea or Demurrer overruled. Defendant to answer.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

Rule 35. — Costs to Defendant on Demurrer or Plea allowed. Motion to amend Bill.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

1. (Oct., 1879.) Under the rules of equity practice established by this court the complainant is not entitled, as a matter of right, to amend his bill after a demurrer thereto has been sustained; but the court may, in its discretion, grant him leave to do so, upon such terms as it shall deem reasonable. *National Bank v. Carpenter*, 11 Otto, 567.

2. (Nov., 1821.) A court of equity may allow an amendment of a bill, after deciding against the bill, and allowing a demurrer, on argument. *Hunt v. Rousmanier's Admrs.*, 2 Mason, 342.

3. (Oct., 1842.) The court, as a matter of course, will give leave to amend the bill so as to obviate the objection made by the demurrer. *Dwight v. Humphreys*, 3 McLean, 104.

4. (June, 1853.) The court gave leave to amend the bill [on sustaining a demurrer for defective allegation of citizenship], and also time to the defendant to put in a voluntary answer, and file affidavits. *Ketchum v. Driggs & Cargill*, 6 McLean, 14.

5. (Feb., 1875.) The fact that the allegations of the bill were imperfect, and a demurrer was sustained, with leave to amend,

does not change the fact of jurisdiction ; as the amendments relate back to, and become part of, the original bill. *Gaylord v. Railroad Co.*, 6 Biss. 286.

Rule 36. — Demurrer or Plea, when not to be held bad.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

Rule 37. — Demurrer or Plea not to be held bad.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

1. (April, 1818.) The general rule is, that if the defendant to a bill in equity answer to the same matter which is covered by his plea, and which by his plea he contends he is not bound to answer, the latter overrules the former. *Ferguson v. O'Harra*, Pet. C. C. 493.

2. Exceptions to this rule. *Ib.*

3. If the plea is only to some part of the bill, the defendant must answer to the residue, unless the matter should be proper for a demurrer. *Ib.*

4. Amendment refused. *Ib.*

**Rule 38. — Replication. Setting down Plea or Demurrer.
Dismissing Bill.**

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

1. (Jan., 1845.) Before a case can be dismissed under the twenty-first rule,¹ regulating equity practice, there must exist, in the technical sense, a plea or demurrer, on the part of the defendant, which the plaintiff shall not have replied to or set down for hearing before the second term of the court after filing the same. *Poultney v. City of Lafayette*, 3 How. 81.

¹ Now thirty-eighth rule.

Rule 39. — Answers.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

Answer to Bill.

1. (Jan., 1837.) No admissions in an answer to a bill in chancery can, under any circumstances, lay the foundation for relief under any specific head of equity, unless it be substantially set forth in the bill. *Jackson v. Ashton*, 11 Pet. 229.

2. (Jan., 1837.) The twenty-third rule of this court for the regulation of equity practice in the Circuit Courts is understood by this court to apply to matters applicable to the merits, and not to mere pleas to the jurisdiction, and especially to those founded on any personal disability, or personal character of the party suing, or to any pleas merely in abatement. The rule does not allow a defendant, instead of filing a formal demurrer or a plea, to insist on any special matter in his answer, and have also the benefit thereof, as if he had pleaded the same matter, or had demurred to the bill. In this respect, the rule is merely affirmative of the general rule of the Court of Chancery, in which matters in abatement and to the jurisdiction, being preliminary in their nature, must be taken advantage of by plea, and cannot be taken advantage of in a general answer, which necessarily admits the right and capacity of the party to sue. *Livingston v. Story*, 11 Pet. 352.

3. (Jan., 1849.) If an exception be taken to an answer in chancery, upon the ground that certain allegations in the bill are neither answered, admitted, nor denied, it becomes necessary to inquire whether the facts charged in the allegations are material, and might, if established, contribute to support the equity of the complainant. *Hardeman v. Harris*, 7 How. 726.

4. If they will not, the omission to answer the allegations is not a good ground for exception to the answer, and the exception must be overruled. *Ib.*

5. Where an allegation in the bill was that the complainants were only sureties, and that their principal was insolvent, the answer was not justly subject to exception for omitting to notice it. The fact in no way strengthened the equity of the complainants. *Ib.*

6. (Dec., 1850.) It was not necessary for an assignee of this recorded judgment, who was defending himself in chancery by claiming under the assignment, to notice in his pleading an allegation in the bill that a release of the judgment was improperly entered upon the record. His assignment was not charged as fraudulent. *Stockton v. Ford*, 11 How. 232.

7. (Dec., 1864.) Stockholders of a corporation who have been allowed to put in answers in the name of the corporation cannot be regarded as answering for the corporation itself. In a special case, however, where there is an allegation that the directors fraudulently refused to attend to the interests of the corporation, a court of equity will, in its discretion, allow a stockholder to become a party defendant for the purpose of protecting—from unfounded and illegal claims against the company—his own interest and the interest of such other stockholders as choose to join him in the defense. *Bronson v. La Crosse Railroad Co.*, 2 Wall. 283.

8. (Dec., 1868.) Where a bill alleging a good title to lands in a complainant, and setting forth particularly the nature of it, sought to have a conveyance made by duress annulled, and the land reconveyed free from the lien of judgments obtained against the grantee after the conveyance, an answer by the judgment creditor, setting up in general terms a good title in the grantee, on the representation and faith of which he had lent such grantee money, must be taken as referring to the title derived under the deed in controversy. And this though there have been no replication to the answer. *Brown v. Pierce*, 7 Wall. 205.

9. Where, in such a bill, the complainant, by way of affecting the judgment creditor with notice, sets forth that he, the complainant, was never out of possession of the land, an answer averring in general terms that the respondent was informed and believed that the complainant entered as tenant of the grantee, but not specifying any time or circumstances of such entry, nor assigning any reason for not specifying them, is insufficient and evasive, there being nothing alleged which tended to show that the grantee ever pretended to have any other title than that derived from the complainant, or that there was any title elsewhere. *Ib.*

10. (Dec., 1868.) In a suit in chancery under a patent, evidence of prior knowledge or use of the thing patented is not admissible, unless the answer contains the names and places of residence of those alleged to have possessed a prior knowledge of the thing, and where the same had been used. *Agawam Company v. Jordan*, 7 Wall. 583.

11. The defense, "that the patentee fraudulently and surreptitiously obtained the patent for that which he knew was invented by another," is not a sufficient defense to a charge of infringement, unless accompanied by the further allegation that the alleged first inventor was at the time using reasonable diligence in adapting and perfecting the invention. *Ib.*

12. On a bill in chancery for an infringement of a patent, the allegation in an answer of sale and public use, "prior to the filing of an application for a patent," with the consent and allowance of the inventor, is insufficient, unless it is also alleged in the answer that such sale or use was more than two years before he applied for a patent. *Ib.*

13. (Oct., 1874.) On such a bill [bill of review], filed by a defendant to set aside the decree, he is bound by the answer filed on his behalf by his solicitor, though he did not himself read it, unless he can show mistake or fraud in filing it. The answers of other defendants cannot be read in his favor. *Putnam v. Day*, 22 Wall. 60.

14. Where the defendant, by his answer, admits the claim to be due, and prays contribution from other defendants, without setting up any defense to the demand, he cannot, after a decree, and on a bill of review, ask to have the decree set aside on the ground of laches on the part of the complainant in bringing suit. *Ib.*

15. (Oct., 1876.) The court below having, on demurrer, held an answer to be sufficient, directed it to be made more specific and certain. The party thereupon filed an answer, which, although in substantial compliance with the order, was stricken out, and judgment rendered in favor of the plaintiff for the amount of the claim sued on. *Held*, that the action of the court in striking out the answer and proceeding to judgment was erroneous. *Fuller v. Claflin*, 3 Otto, 14.

16. (Oct., 1877.) Where a defense is by way of traverse, it is not error to strike out so much thereof as is not responsive to the allegations of the petition. *Hart v. United States*, 5 Otto, 316.

17. (Oct., 1878.) Persons sued as infringers may, if they comply with the statutory condition as to notice, give the special defenses mentioned in the Patent Act in evidence, under the general issue. *Bates v. Coe*, 8 Otto, 31.

18. Such notices, in a suit in equity, may be given in the answer; and the provision is, that, if any one of those defenses is proved, the judgment or decree shall be in favor of the defending party, with costs. *Ib.*

19. Defenses of the kind, where the invention consists in a combination of old elements, incapable of division or separate use, must be addressed to the entire invention, and not merely to separate parts of the thing patented. *Ib.*

20. . . . The court overruled the defenses, for two reasons: 1. Because they were not set up in the answer. 2. Because they were addressed to a part only of an indivisible improvement, and not to the entire invention, as required by the act of Congress. *Ib.*

21. (May, 1829.) A purchaser [of the legal title] who chooses to answer the bill generally, need not aver that he is a purchaser without notice. The plaintiff [who sets up an equitable title] must prove notice. *McNeil v. Magee*, 5 Mason, 245.

22. (May, 1834.) The twenty-third rule of the Supreme Court in equity, declaring "that the defendant, instead of a formal demurrer or plea, may insist upon any special matter in his answer, and have the same benefit thereof as if he had pleaded the same matter, or demurred to the bill," is simply in affirmance of the common practice of courts of equity, and applies to matters to the merits, and not to such objections as are in abatement merely. *Wood v. Mann*, 1 Sumn. 578.

23. (June, 1835.) A general answer in chancery overrules the pleas. *Taylor v. Luther*, 2 Sumn. 228.

24. Where the plaintiff, in his bill in chancery, directly charged upon the defendant, that he had made and entered into a certain agreement, a simple denial by the defendant, in his answer, "according to his recollection and belief," is insufficient, and must be treated as a mere evasion. *Id.*

25. (Oct., 1840.) The defendant in equity is bound to answer, in direct and unequivocal terms, as to the state of his mind, with regard to every fact stated in the bill, to which he is interrogated; either that he does believe the matter inquired of, or that he cannot form any belief, or has none, concerning it; and, according as the answer may be, he must state that he calls on the plaintiff for proof, or that he admits the particular fact, or that he waives all controversy concerning it. *Brooks v. Byam*, 1 Story, 297.

26. (May, 1846.) Where a bill in chancery asks answers to certain pertinent interrogatories, according to the knowledge, information, and belief of the respondents, it is their duty, not merely to state their own knowledge, but the information, if any derived from others, and their belief on the subject. *Kittredge v. Claremont Bank*, 1 Woodb. & M. 244.

27. If one of the respondents be a corporation, the officers answering are bound to make full inquiries on the matter before answering. *Id.*

28. When the court has once ordered the respondents to answer more fully on such matters, and exceptions are taken and sustained again to omissions or evasions, the court will not allow the answers to be amended without cost, to be followed by harsher measures if the omissions are repeated. *Id.*

29. (Oct., 1846.) An answer [to a bill for an injunction against the use of a patent] is sufficient for this purpose, though it do not set out the names of the persons who used the stove patented, or knew it before the patentee did, nor the names of the places where it was used or known. *Orr v. Merrill*, 1 Woodb. & M. 376.

30. But the answer at law should set them out, and so should the answer and notice on which, in chancery, an issue is asked to be formed and tried at law. *Id.*

31. (Oct., 1846.) The objection [to jurisdiction, because there

is a remedy at law] may sometimes be taken here, under the answer, and at the hearing, as well as by demurrer. *Pierpont v. Fowle*, 2 Woodb. & M. 24.

32. (May, 1847.) When a demurrer for these causes [because an injunction bill is not sworn to, &c.] is overruled, the respondents may have leave to answer further by the payment of costs; and they may further contest a temporary injunction, though, after an order to file testimony in it, none was filed, but merely a demurrer. *Woodworth v. Edwards*, 3 Woodb. & M. 120.

33. But after such neglect of the order, and the overruling of the demurrer as bad, the case will not be opened for further hearing as to the temporary injunction, but be treated as if the facts were confessed, unless an affidavit is filed that the course pursued was not for delay, and indemnity is also filed against any damage caused by the delay and the use of the machine against which an injunction is desired. *Ib.*

34. (May, 1855.) An admission in an answer to a bill in equity, that a deed bears a certain date, does not estop the defendant from showing that the deed was not then delivered, and was fraudulently antedated. *Holbrook v. Worcester Bank*, 2 Curt. C. C. 244.

35. (May, 1855.) Where a bill alleged that an agreement of compromise was made, and the answer goes into a history of the dispute compromised, it is not responsive to the bill. *Sargent v. Larned*, 2 Curt. C. C. 340.

36. (Oct., 1868.) If the respondent have no personal knowledge of the matter set forth in any particular allegation of the bill of complaint, a denial by the respondent, upon information and belief, is sufficient to make it necessary for the complainant to prove the same. *Robinson v. Mandell*, 3 Cliff. 169.

37. (Sept., 1874.) Where the answer, in a suit in equity to restrain infringement of a patent, contains no notice of prior patents, or persons by whom, and places where, the patented improvement was known or used before the alleged invention of the patentee, copies of the drawings of prior patents, and testimony respecting them, are not admissible in evidence, against the complainant's objection, to show that the patentee was not the original and first inventor of the patented improvement. *Earl v. Dexter*, 1 Holmes, 412.

38. (Nov., 1850.) The party setting up such a contract [for

an interest in a grant of a future term of a patent not yet *in esse*], by way of equitable defense to the legal title to the same interest, must deny that the plaintiff is a *bona fide* purchaser, for a valuable consideration, without notice, and must assume the burden of impeaching the legal title. *Gibson v. Cook*, 2 Blatchf. 144.

39. (March, 1856.) [Suit in equity for an injunction and relief, for the infringement of a trade-mark.] In this case it was held that the mere affidavit of the defendant, without a formal answer, denying that the trade-mark claimed was the original device of the plaintiff's assignor, or was first adopted by him, was not sufficient to bar the equity of the plaintiff arising out of the facts charged in the bill, and his long undisturbed possession and use of the trade-mark, corroborated, as his right was, by after acts and declaration of the defendant. *Walton v. Crowley*, 3 Blatchf. 440.

40. (July, 1858.) Where the bill avers that the defendant will, in future, violate, as he has heretofore done, the rights secured by the patent, established on the trial at law, unless restrained by injunction, it is not sufficient for the defendant to aver that what he has done since the trial has not been in violation of the plaintiff's rights, but he should state distinctly that he does not intend in future to do the specific things which the court determined he had no right to do. *Poppenhusen v. Gutta-Percha Comb Co.*, 4 Blatchf. 185.

41. (March, 1869.) Exercise of the jurisdiction, under the sixteenth section of the act of July 4, 1836 (5 Stat. at Large, 123), to declare void one of two interfering patents.

What averments, in an answer to a bill filed to have a patent declared void, in the exercise of such jurisdiction, constitute an admission that the two patents which are claimed to interfere, cover and claim, in whole or in part, the same inventions. *Gold and Silver Ore Separating Co. v. United States Disintegrating Ore Co.*, 6 Blatchf. 307.

42. (March, 1869.) Effect of an admission made in an answer that the defendants had made "large profits" by the use of machinery alleged to infringe the plaintiffs' patent, upon the question of the amount of net profits derived from such infringement, on an accounting before a master, under a decree. *Troy Iron and Nail Factory v. Corning*, 6 Blatchf. 328.

43. (April, 1869.) An answer, in a suit in equity, ought, in

order to raise the defense of want of novelty in a patent, to specify the time, place, and person, when, where, and by whom, the prior invention was made or known, with sufficient particularity to enable the plaintiff to know what he has to meet. *Brown v. Hall*, 6 Blatchf. 401.

44. (May, 1869.) An objection that a bill in equity was filed under an agreement made between the plaintiffs and certain other parties, which is void for champerty, ought to be raised formally, by answer, and not by a motion to take the bill from the files. *Sperry v. Erie Railway Co.*, 6 Blatchf. 425.

45. (Sept., 1871.) Where, in a suit in equity, the want of parties is not set up or suggested in the answer, it cannot avail on final hearing, unless the case is one in which the court cannot proceed to a decree between the parties before it, without prejudice to the rights of those who are proper to be made parties, but who are not brought into court. *Wallace v. Holmes*, 9 Blatchf. 65.

46. (June, 1872.) The point that a cause of action arose in the Northern District of New York, so as not to be cognizable by the Circuit Court for the Southern District of New York, may be voluntarily waived by a defendant, and is waived where, in a suit in equity, it is not raised in the answer. *Black v. Thorne*, 10 Blatchf. 68.

47. (Jan., 1873.) The testimony of a witness to prove prior knowledge of the plaintiff's invention stricken out at the hearing, on motion, on the ground that his place of residence at the time of putting in the answer was not given in the answer. *Decker v. Grote*, 10 Blatchf. 332.

48. (June, 1874.) An answer in a suit in equity, in the names of all three of the defendants, as their joint and several answer, but signed and sworn to by only two of them, will be stricken from the files, as irregular, but with leave to the two to erase therefrom the name of the third, and file it as their own answer only. *Baily Washing Machine Co. v. Young*, 12 Blatchf. 199.

49. (April, 1877.) In a suit in equity on a patent a preliminary injunction was granted, on notice and without opposition. Afterwards a decree *pro confesso* was entered, and a reference ordered, which was commenced, and witnesses were examined, and the defendants produced their accounts and attended by counsel. Afterwards they moved to set aside the decree and for leave to file an answer, alleging matters which had been set up

in a prior suit on the patent and overruled by the court, and sundry new matters. No mistake or misapprehension or neglect of counsel was alleged. The plaintiffs offered to limit their recovery to \$500, which would be less than the expense to the defendants of trying the issues. The defendants had ceased to use the patented invention. *Held*, that the motion must be denied, on the plaintiffs stipulating to limit their recovery to \$500. *Andrews v. Denslow*, 14 Blatchf. 182.

50. (July, 1878.) In a suit in equity on letters-patent, the defense of the insufficiency of the specification to enable the invention to be practiced must be set up in the answer or it cannot be availed of. *Jennings v. Pierce*, 15 Blatchf. 42.

51. (Aug., 1879.) A defense in a suit in equity, that the patentee has, since he obtained his patent, abandoned or dedicated it to the public use, must be set up in the answer. *Williams v. Boston & Albany Railroad Co.*, 17 Blatchf. 21.

52. (June, 1880.) A suit for the infringement of a patent, in using school furniture in the schools of the city of New York, was brought against the city and the Board of Education, the latter being a corporation within that of the city, and in charge of its schools. Answers were put in and proofs taken. During the pendency of the suit, two successive successors to the Board of Education were created, the last one being also called by the same name. It was summoned to appear as a defendant, but did not. The bill was not taken *pro confesso*, against it. The case was heard and decided without objection. After a decree for the plaintiff, the new Board of Education filed an answer. The plaintiff moved to take it from the file. *Held*, that the motion must be granted. *Allen v. The Mayor, &c. of the City of New York*, 18 Blatchf. 239.

53. (Oct., 1821.) The court will not permit the answer of the attorney of the defendant in the suit at law to be filed as a substitute for the answer of the defendant himself. *Read v. Consequa*, 4 Wash. 175.

54. (April, 1871.) When, in a chancery suit in the United States courts, a question of title to property is involved in the validity of a will, parties to the suit who are not barred by prescription, waiver, estoppel, or some other supervening cause, may contest its validity by answer, or by proceedings in the Court of Probate for a revocation of the probate, or in both methods. *Fuentes v. Gaines*, 1 Woods, 113.

55. (April, 1872.) The well-known rule of chancery pleading, that if a defendant submits to answer, he shall answer fully to all matters of the bill, is abrogated in cases where the defendant might by plea protect himself from such answer and discovery, and in his answer sets forth the matter of such plea as a bar to the merits of the bill, by the thirty-ninth rule in equity established by the Supreme Court of the United States. *Gaines v. Agnelly et al.*, 1 Woods, 238.

56. If the bar set up in the answer is a sufficient defense to the whole relief sought by the bill, it is immaterial whether the defendant answer the allegations of the bill or not. He is not bound to answer them; and the rule no longer applies, that if the defendant does answer at all, even on matters outside of the bar, he must answer fully. *Id.*

57. Under the old equity practice, if a plea in bar was filed and issue taken upon it, and that issue decided in complainant's favor, he was entitled to a decree without proving the allegations of his bill. If the same matters were set up in the answer, he was obliged to prove his bill; but in aid of such proof he was entitled to defendant's answer to the whole bill. *Id.*

58. The new rule in equity practice (the thirty-ninth) which allows a defendant to set up a bar in his answer, and excuses him from answering further, still leaves the complainant under the burden of proving his bill, and takes from him the benefit of the defendant's answer; but the defendant is liable to be called as a witness in the cause. *Id.*

59. Under the new rule in equity (thirty-ninth), where the answer sets up a bar to the whole bill, and claims the benefit of it as a plea in bar, it is no longer a ground of exception that it does not fully answer the allegations of the bill. *Id.*

60. If the bar set up in the answer, and claimed as such, be insufficient, or if it be unsupported by proper averments, or by a proper answer to rebut allegations of the bill repugnant to the bar, the complainant may except for insufficiency, set the cause down on bill and answer only, or file a replication and proceed to proofs, according to the exigencies of the case. *Id.*

61. If the bar set up in the answer be insufficient as such, the complainant would be entitled to except as for want of a full answer; and to avoid answering the exceptions, the defendant in such case would require leave of the court before he could amend

the bar. If, instead of excepting, the complainant should go to proof, the burden would be on him to prove his bill, and on the defendant to prove his bar, each being entitled to examine the other as a witness. If, however, he should set the cause down for hearing on bill and answer only, the answer would have to be taken as true, and the bar therein as proved; and though insufficient as a defense, the complainant could not have a decree, unless the answer admitted the allegations of the bill on which the prayer for relief was founded. *Ib.*

62. (Nov., 1873.) Under the thirty-ninth rule in equity, when a defendant sets up in his answer the bar of the Statute of Limitations, and the same is well pleaded, he is thereby excused from further answer to such parts of the bill as are covered by it. *Samples v. The Bank*, 1 Woods, 523.

63. (June, 1841.) It is not the English practice to set up a matter in the answer which shall have the effect of a cross-bill; and our practice is derived from that of the High Court of Chancery in England. *Hubbard v. Turner*, 2 McLean, 519.

64. (May, 1844.) A defendant in his answer cannot introduce new matter in the nature of a cross-bill, and require the plaintiff and others under whom he claims to answer it. *Morgan v. Tipton*, 3 McLean, 339.

65. (June, 1846.) A joint answer is sufficient, all the parties swearing to it. *Davis v. Davidson*, 4 McLean, 136.

66. Answers to bills are generally drawn jointly and severally. *Ib.*

67. (Sept., 1873.) An answer by a defendant, denying upon information and belief allegations in the bill concerning which his knowledge, if any, must be direct and personal, is insufficient; and if he had no knowledge, it should be so stated directly. *Burpee v. First National Bank*, 5 Biss. 405.

68. Such denials do not raise an issue; and the allegations [in the bill] must be taken as true. *Ib.*

69. These rules apply to a corporation as well as to an individual. *Ib.*

Answer to Bill of Revivor.

1. (Oct., 1874.) New defenses, *i.e.* defenses not made in an answer to the original bill, cannot be first set up in an answer to a bill of revivor. Such bill puts in issue nothing but

the character of the new party brought in. *Fretz v. Stover*, 22 Wall. 198.

2. (June, 1825.) *Semble*, that the exception that a devisee cannot sue out a bill of revivor may be taken by answer, as well as by plea or demurrer. *Slack v. Walcott*, 3 Mason, 508.

Answer, as Evidence.

1. (Feb., 1815.) The answer of one defendant in chancery is not evidence against his co-defendant; nor is his deposition, although he had been discharged under the act of assembly of Rhode Island (of 1757) from all debts and contracts prior to the date of the discharge, and although the debt in suit was a debt contracted prior to such discharge, the debt having been contracted in a foreign country. *Clark v. Van Riemsdyk*, 9 Cranch, 153.

2. An answer in chancery, although positive, and directly responsive to an allegation in the bill, may be outweighed by circumstances, especially if it be respecting a fact which, in the nature of things, cannot be within the personal knowledge of the defendant. *Ib.*

3. A denial by the defendant that his testator gave authority to A. to draw a bill of exchange is not such an answer to an averment of such authority as will deprive the complainant of his remedy, unless the defendant also deny the subsequent assent of his testator to the drawing of such bill. *Ib.*

4. (Feb., 1824.) In general, the answer of one defendant in equity cannot be read in evidence against another. But where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule does not apply. *Osborn v. Bank of United States*, 9 Wheat. 739.

5. (Jan., 1843.) The answer of one defendant in equity is not evidence in behalf of another defendant. *Morris v. Nixon*, 1 How. 119.

6. (Jan., 1846.) The answer being responsive to the bill, and denying the allegation, under oath, the general rule is that the allegation must be proved, not only by the testimony of one witness, but by some additional evidence. *Carpenter v. Providence Washington Insurance Co.*, 4 How. 185.

7. Several qualifications and limitations of this rule examined. *Ib.*

8. (Nov., 1813.) In general, in a bill in equity, the answer of one co-defendant is no evidence against another. But this rule does not apply to the case where the defendants are all partners in the same transaction; for in such a case the answer or confession of either is evidence against the others. *Reimsdyk v. Kane*, 1 Gall. 630.

9. (Oct., 1818.) The defendant's answer in support of his plea is good evidence, and unless disproved by two witnesses, or by one witness and very strong circumstances, it must prevail in his favor. *Hughes v. Blake*, 1 Mason, 515.

10. (June, 1824.) If an answer to a bill in equity relies on new facts, by way of discharge or avoidance, or defense not responsive to the bill, they must be established by independent proofs; the answer is not evidence to support them. *Randall v. Phillips*, 3 Mason, 378.

11. (Nov., 1837.) The answer of a defendant in another suit, though good evidence against him, is not admissible against a co-defendant. *Dexter v. Arnold*, 3 Sumn. 152.

12. (May, 1842.) An answer, responsive to the allegations and charges in the bill, will prevail in favor of the defendant, as evidence, unless it be overcome by the testimony of two witnesses, or of one witness and corroborative circumstances. *Langdon v. Goddard*, 2 Story, 267.

13. (Oct., 1844.) An answer responsive to allegations in a bill in equity is positive evidence, and to be taken as true, unless disproved by the testimony of two credible witnesses, or of one credible witness and facts entirely equivalent to and as corroborative as another witness. *Gould v. Gould*, 3 Story, 516.

14. (May, 1845.) An answer in equity to facts charged in the bill is to be taken as true, until the contrary is clearly established. *Greeley v. Smith*, 3 Story, 659.

15. (Oct., 1845.) The sworn answer of a defendant in equity, when responsive to material allegations in the bill, must be taken as true, unless impugned by the testimony of more than one witness. *Towne v. Smith*, 1 Woodb. & M. 115.

16. (Oct., 1860.) If the answer of the defendant is responsive to the bill, it is evidence in his favor, and is conclusive, unless disproved by something more than the testimony of one witness. *Delano v. Winsor*, 1 Cliff. 501.

17. (Oct., 1861.) Where the allegations of the answer are

directly responsive to the bill, courts of equity cannot decree against such denials of the respondents on the testimony of a single witness. *Tobey v. Leonard*, 2 Cliff. 40.

18. The rule is universal that the complainant, in such a case, must have two witnesses, or one witness and corroborative circumstances, or he is not entitled to relief. *Ib.*

19. The complainant, calling upon the respondent to answer an allegation, admits the answer to be evidence; and if it is testimony, it is equal to the testimony of any other witness. *Ib.*

20. (Oct., 1862.) Where the answer is responsive to the bill of complaint, and positively denies the matter charged, and the denial has respect to a transaction within the knowledge of the respondent, the answer is evidence in his favor; and unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other facts and circumstances, which give to it greater weight than the answer, or are equivalent in weight to a second witness, it is conclusive; so that the court will neither make a decree nor send the case to trial, but will dismiss the bill. *Badger v. Badger*, 2 Cliff. 137.

21. (Oct., 1863.) Where matters pleaded in the answer are in avoidance of the claim of the complainant, such allegations are not evidence, but must be proved; and the burden of proof is upon the respondent. *Howe v. Williams*, 2 Cliff. 245.

22. (May, 1874.) Where the answer is responsive to the bill, positively denies the matter charged, and has respect to transactions within the knowledge of the party making it, it is evidence in favor of the respondent; and unless overcome by the testimony of two witnesses, or one witness and corroborating circumstances, the rule in equity is that the answer is conclusive. *Hayward v. Eliot National Bank*, 4 Cliff. 294.

23. (April, 1878.) Where the answer is responsive to the bill of complaint, and positively denies the matter charged, and the denial is made in respect to a transaction within the knowledge of the respondent, the answer is evidence in his favor; and unless it is overcome by the satisfactory testimony of two opposing witnesses, or of one witness corroborated by other facts and circumstances, which give to it greater weight than the answer of the respondent, it is conclusive; so that the court will neither make a decree nor send the case to trial, but will simply dismiss the bill of complaint. *Gilman v. Libbey*, 4 Cliff. 447.

24. When the complainant calls upon the respondent to answer an allegation, he admits the answer, if duly filed, to be evidence; and if it is testimony, it is equal to the testimony of any other witness. *Ib.*

25. As the complainant cannot prevail if the balance of proof is not in his favor, he must have circumstances in addition to his single witness, in order to turn the balance. *Ib.*

26. (March, 1832.) In chancery proceedings, in the courts of the United States, when the answer is responsive to allegations in the bill, it is considered as evidence, and must be rebutted by something more than simply the testimony of one witness. *Pomerooy v. Manin*, 2 Paine, 476.

27. (April, 1808.) If an answer to any particular charge in the bill deny the same, it must be opposed by the plaintiff, by two witnesses, or by one and circumstances. *Gernon v. Bocaline*, 2 Wash. 199.

28. (Oct., 1826.) The answer in chancery of a corporate body, under its common seal, denying the equity of the bill, is sufficient to warrant a denial of an injunction, or to dissolve it if granted. *Haight v. Proprietors of Morris Aqueduct*, 4 Wash. 601.

29. (July, 1870.) Where, in a bill to set aside a conveyance on the ground of fraud by the defendants, the complainant calls for the answers of the defendants, under oath, as to the actual date of the execution of a contract relied upon, and the defendants answer, under oath, that it was not executed until a day much later than its date, the *prima facie* evidence made by the instrument is overcome. *Walker v. Derby*, 5 Biss. 134.

30. In such case, the rule applies that the answer called for under oath is, if responsive to the bill, conclusive, unless disproved by two witnesses, or by one witness and strong corroborative evidence. *Ib.*

Answer. Signature of Counsel.

1. (June, 1846.) An answer must be signed by counsel, in order that the counsel may be held responsible to the court for the contents of the answer. *Davis v. Davidson*, 4 McLean, 136.

2. If the answer be taken by commissioners, the signature of counsel is not required. *Ib.*

Rule 40. — Interrogatories in Bill.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

DECEMBER TERM, 1850.

Ordered, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the Circuit Courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

1. (Oct., 1843.) Where an interrogatory was put, as to "whether, on the twentieth day of August, 1838, the said A. prepared and procured the signature of the said B. to a codicil, in which the said B. bequeathed to the said A. the said notes of C. and D., and whether the said A. retained the codicil after its execution," — *Held*, that although the interrogatory was not so full and precise as it should have been, yet that it was sufficient to call for a full and explicit answer to its plain import; and as the answer was inexplicit and evasive, the defendant was ordered to make a full disclosure of the facts, and to pay the costs of the hearing on the exceptions; and leave was granted to the plaintiff to file additional interrogatories. *Langdon v. Goddard*, 3 Story, 13.

2. (April, 1871.) If a bill does not contain specific interrogatories, the complainant must be satisfied with such answer to its allegations as would fairly occur to the professional mind as meeting them in a substantial manner. *Parsons v. Cumming*, 1 Woods, 461.

3. Defendant is not bound to exercise ingenuity in finding out all the aspects in which a statement in a bill may be taken. *Ib.*

4. A general answer is sufficient for a general allegation. *Ib.*

5. If it is apparent that the defendant has omitted to answer

any material allegation, or has evaded giving an answer, or has answered disingenuously, the court will compel another answer. *Ib.*

6. Where discovery is a principal object, distinct interrogatories should be affixed to the bill. *Ib.*

7. (Oct., 1843.) Under the fortieth rule, the defendant is not bound to answer, unless special interrogatories be put in the bill. Such a bill is clearly demurrable. *Treadwell v. Cleveland*, 3 McLean, 283.

Rule 41. — Numbering Interrogatories. Waiver of Oath to Answer, &c.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," &c.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

DECEMBER TERM, 1871.

Amendment to Forty-first Equity Rule.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under sec. 3 of the act of Congress of July 2, 1864.

1. (Jan., 1848.) Where the complainant, in a bill, offers to receive an answer without oath, and the defendant accordingly filed the answer without oath, denying the allegations of the bill, the complainant is not put to the necessity, according to the

general rule, of contradicting the answer by the evidence of two witnesses, or of one witness with corroborating circumstances. The answer, being without oath, is not evidence, and the usual rule does not apply. *Patterson v. Gaines*, 6 How. 550.

2. (Oct., 1872.) Waiver by the bill, of oath in the answer, amounts to nothing, unless accepted by the respondents. *Amory v. Lawrence*, 3 Cliff. 524.

3. (April, 1871.) If the plaintiff waives an answer on oath, the defendant has a right to answer on oath, notwithstanding such waiver; and the tender of the waiver is no ground of demurrer to the bill. If the tender is not accepted, the defendant is still bound to answer the bill, either without oath or on oath. *Heath v. Erie Railway Co.*, 8 Blatchf. 348.

Rule 42. — Note at Foot of Bill. Interrogatories.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.

Rule 43. — Form of Bill preceding the Interrogating Part.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say —

"1. Whether, &c.

"2. Whether, &c."

Rule 44. — Declining to answer Interrogatory.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he

might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

Rule 45. — No Special Replication. Amendment of Bill.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

Rule 46. — Supplemental Answer, after Amendment of Bill.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

Rule 47. — Parties to Bills.

In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

1. (Feb., 1805.) The want of proper parties is not sufficient ground for dismissing the bill. *Milligan v. Milledge*, 3 Cranch, 220.

2. (Feb., 1812.) The court will not make a final decree upon the merits of the case, unless all persons who are essentially interested are made parties to the suit, although some of those persons are not within the jurisdiction of the court. *Russell v. Clark*, 7 Cranch, 72.

3. (Feb., 1815.) A bill in equity to enjoin a judgment at law is not to be considered as an original bill, and therefore it is not

necessary, in a court of limited jurisdiction, to make other parties, if the introduction of those parties should create a doubt as to the jurisdiction of the court. *Simms v. Guthrie*, 9 Cranch, 19.

4. (Feb., 1817.) Rule requiring all persons interested, to be parties to a bill in chancery. *Morgan v. Morgan*, 2 Wheat. 298.

5. Exception to this rule. *Ib.*

6. (Feb., 1819.) Upon a bill filed by the United States, proceeding as ordinary creditors against the debtor of their debtor, for an account, &c., the original debtor to the United States ought to be made a party, and the account taken between him and his debtor. *United States v. Howland*, 4 Wheat. 108.

7. (Feb., 1823.) This court will not suffer its jurisdiction, in an equity cause, to be ousted, by the circumstance of the joinder or non-joinder of merely *formal* parties, who are not entitled to sue, or liable to be sued, in the United States courts. *Wormley v. Wormley*, 8 Wheat. 422.

8. (Feb., 1825.) The rule which requires all the parties in interest to be brought before the court does not affect the jurisdiction, but is subject to the discretion of the court, and may be modified according to circumstances. *Elmendorf v. Taylor*, 10 Wheat. 152.

9. In the courts of the United States, wherever the case may be completely decided as between the litigant parties, an interest existing in some other person, whom the process of the court cannot reach, as, if such party be a resident of another state, will not prevent a decree upon the merits. *Ib.*

10. (Feb., 1825.) The joinder of improper parties, as citizens of the same state, &c., will not affect the jurisdiction of the Circuit Courts in equity, as between the parties who are properly before the court, if a decree may be pronounced as between the parties who are citizens of the same state. *Carneal v. Banks*, 10 Wheat. 181.

11. (Feb., 1825.) A certified bankrupt or insolvent, against whom no relief can be had, is not a necessary party to a suit in equity; but if he be made a defendant, he cannot be examined as a witness in the cause until an order has been obtained upon motion for that purpose. *De Wolf v. Johnson*, 10 Wheat. 367.

12. (Feb., 1826.) In a suit in equity brought by heirs-at-law to set aside a conveyance obtained from their ancestor by fraud and imposition, a final decree for the sale of the property cannot

be pronounced until all the heirs are brought before the court as parties, if they are within the jurisdiction. *Harding v. Handy*, 11 Wheat. 104.

13. If all the heirs cannot be brought before the court, the undivided interest of those who are made parties may be sold. *Ib.*

14. (Feb., 1826.) Although, in general, all incumbrancers must be made parties to a bill of foreclosure, yet where a decree of foreclosure and sale was made and executed, at the suit of a subsequent mortgagee, and with the consent of the mortgagor, it not appearing to the court that there was any prior incumbrance, the proceedings will not be set aside upon the application of the mortgagor, in order to let in the prior mortgagee, who ought regularly to have been made a party, unless it be necessary to prevent irremediable mischief. *Finley v. Bank of United States*, 11 Wheat. 304.

15. *Quære*: Whether such a practice be admissible in any case. *Ib.*

16. (Jan., 1827.) Where an equity cause may be finally decided as between the parties litigant, without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the Circuit Court, if its process cannot reach them, or if they are citizens of another state. *Mallow v. Hinde*, 12 Wheat. 198.

17. But if the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made between them, without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties. *Ib.*

18. But the court may, in its discretion, where the purposes of justice require it, retain jurisdiction of the cause on an injunction bill as between the parties regularly before it, until the plaintiffs have had an opportunity of litigating their controversy with the other parties in a competent tribunal; and if it finally appear by the judgment of such tribunal that the plaintiffs are equitably entitled to the interest claimed by the other parties, may proceed to a final decree upon the merits. *Ib.*

19. (Jan., 1827.) On a bill filed by an executor against a devisee of lands charged with the payment of debts, for an account of the trust fund, &c., the creditors are not indispen-

sable parties to the suit. The fund may be brought into court, and distributed under its direction, according to the rights of those who may apply for it. *Potter v. Gardner*, 12 Wheat. 499.

20. (Jan., 1828.) Where, in a bill filed for discovery and relief, the party relied upon a deed said to have been lost, but which had never been formally executed to convey the real estate, and upon a receipt of the purchase-money, binding the party to convey the estate, the person alleged to have executed the lost deed, and who gave the receipt, should have been made a party to the proceeding; although he had subsequently, by a legal and formal conveyance duly executed, conveyed the estate to others; and thus, so far as he could, divested himself of all title in the same. *Findlay v. Hinde*, 1 Pet. 241.

21. (Jan., 1829.) As the plaintiffs in the Circuit Court claimed under a conveyance made in pursuance of a decree of a court of competent jurisdiction, the bill ought not to have been dismissed for want of parties. The Circuit Court ought to have given leave to make new parties, and on their failing to bring the proper parties before the court, the dismissal should have been without prejudice. *Hunt v. Wyckliffe*, 2 Pet. 201.

22. (Jan., 1830.) Where a bill was filed to compel the execution of securities for money loaned, which securities, it was alleged in the bill, were promised to be given upon particular real estate purchased with the money loaned, and the complainants had omitted to make the prior mortgagees of the premises on which the securities were required to be given parties to the bill, the court said: It has been urged in reply to those grounds of reversal for want of parties, or for want of due maturation for a final hearing, that nothing is ordered to be mortgaged or sold besides the interest of the party who is ordered to execute the mortgage, or whose interest is to be sold, whatever that may be. But this we conceive to be an insufficient answer. It is not enough that a court of equity causes nothing but the interest of the proper party to change owners. Its decree should terminate, and not instigate, litigation. Its sales should tempt men to sober investment, and not to wild speculation. Its process should act upon known and definite interests, and not upon such as admit of no medium of estimation. It has means of reducing every right to certainty and precision, and is therefore bound to employ these means in the exercise of its jurisdiction. *Caldwell v. Taggart*, 4 Pet. 190.

23. The general rule is, "that however numerous the persons interested in the subject of a suit, they must all be made parties, plaintiff or defendant, in order that a complete decree may be made;" it being the constant aim of a court of equity to do complete justice by embracing the whole subjects, deciding upon and settling the rights of all persons interested in the subject of the suits, to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation. *Ib.*

24. (Jan., 1833.) A bill was filed in the Circuit Court of Ohio, claiming a conveyance of certain real estate in Cincinnati from the defendants; and after a decree in favor of the complainants and an appeal to the Supreme Court, the decree of the Circuit Court was reversed, because a certain Abraham Garrison, through whom one of the defendants claimed to have derived title, had not been made a party to the proceedings, and who was, at the time of the institution of the same, a citizen of the State of Illinois, although the fact of such citizenship did not then appear on the record. Afterwards, a supplemental bill was filed in the Circuit Court, and Abraham Garrison appeared and answered, and disclaimed all interest in the case; whereupon the Circuit Court, with the consent of the complainants, dismissed the bill as to him. BY THE COURT: If the defendants have distinct interests, so that substantial justice can be done by decreeing for or against one or more of them, over whom the court has jurisdiction, without affecting the interests of others, its jurisdiction may be exercised as to them. If, when the cause came on for hearing, Abraham Garrison had still been a defendant, a decree might then have been pronounced for or against the other defendants, and the bill have been dismissed as to him, if such decree could have been pronounced as to them without affecting his interests. No principle or law is perceived which opposes this course. The incapacity of the court to exercise jurisdiction over Abraham Garrison could not affect their jurisdiction over other defendants whose interests were not connected with his, and from whom he was separated, by dismissing the bill as to him. *Vattier v. Hinde*, 7 Pet. 252.

25. The cases of *Nolan v. Torrance* (9 Wheat. 537), *Connolly v. Taylor* (2 Pet. 556), and *Cameron v. M'Roberts* (3 Wheat. 591), cited and affirmed. *Ib.*

26. It is the settled practice in the courts of the United States,

if the case can be decided on its merits, between those who are regularly before them, although other persons not within their jurisdiction, may be collaterally or incidentally concerned, who must have been made parties if they had been amenable to its process, that these circumstances shall not expel other suitors who have a constitutional and legal right to submit their case to a court of the United States, provided the decree may be made without affecting their interests. This rule has also been adopted by the court of chancery in England. *Ib.*

27. (Jan., 1834.) The principle is unquestionable that all the parties to the original decree ought to join in the bill of review. *Bank of United States v. White*, 8 Pet. 262.

28. (Jan., 1835.) Upon motions made to the court, and from proceedings in the Circuit Court laid before the court, it appears that there are certain claimants of the bequest asserting themselves to be "heirs-at-law," whose claims were not adjudicated upon in that court on account of their having been presented at too late a period. BY THE COURT: As the cause is to go back again for further proceedings, and must be opened there for new allegations and proofs, the claimants will have a full opportunity of presenting and proving their claims; and they ought to be let into the cause for that purpose. *Harrison v. Nixon*, 9 Pet. 484.

29. (Jan., 1840.) A bill for an injunction was filed alleging that the parties, who had obtained a judgment at law for the amount of a bill of exchange, of which the complainant was indorser, had, before the suit was instituted, obtained payment of the bill from a subsequent indorser out of funds of the drawer of the bill, obtained by the subsequent indorser from one of the drawers. It was *held* that it was not necessary to make the subsequent indorser, who was alleged to have made the payment, a party to the injunction bill. *Atkins v. Dick*, 14 Pet. 114.

30. (Jan., 1847.) It is not irregular for two mercantile firms to unite as complainants in equity in a creditor's bill. *Nelson v. Hill*, 5 How. 127.

31. (Jan., 1848.) But it is no objection to such a bill, as a rule of pleading, that the husband is made a party to it with the wife. He acts only as her *prochein ami*. *Bein v. Heath*, 6 How. 228.

32. (Dec., 1850.) The forty-seventh and forty-eighth rules of chancery practice explained. *McCoy v. Rhodes*, 11 How. 131.

33. (Dec., 1854.) Neither the act of Congress of 1839 (5 Stat.

at Large, 321, s. 1) nor the forty-seventh rule for the equity practice of the Circuit Courts enables a Circuit Court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by such decree. *Shields v. Barrow*, 17 How. 130.

34. The cases upon this point, the statute, and the rule examined. *Ib.*

35. (Dec., 1856.) Where a sale of mortgaged property in Louisiana was made under proceedings in insolvency, and the heirs of the insolvent filed a bill to set aside the sale, on the ground of irregularity, it was necessary to make the mortgagees parties. They had been paid their share of the purchase-money, and had an interest in upholding the sale. *Coiron v. Millaudon*, 19 How. 113.

36. The fact that such persons are beyond the jurisdiction of the court is not a sufficient reason for omitting to make them parties. *Ib.*

37. (Dec., 1856.) Where money was borrowed from a bank upon a promissory note signed by the principal and two sureties, and the principal debtor, by way of counter security, conveyed certain property to a trustee, for the purpose of indemnifying his sureties, it was necessary to make the trustee and the *cestui que trust* parties to a bill filed by the bank, asserting a special lien upon the property thus conveyed. *McRea v. Branch Bank*, 19 How. 376.

38. But where the principal debtor had made a fraudulent conveyance of the property, which had continued in his possession, after the execution of the first deed, and then died, a bill was good, which was filed by the bank against the administrators, for the purpose of setting aside the fraudulent conveyance, and bringing the property into the assets of the deceased for the benefit of all creditors who might apply. *Ib.*

39. (Dec., 1860.) It was not necessary to make the contractor, who had sold out, a party; nor was the bill multifarious because it claimed to enforce the liens upon several tolls. *Fitch v. Creighton*, 24 How. 159.

40. (Dec., 1867.) Part owners or tenants in common in real estate, of which partition is asked in equity, have an interest in the subject-matter of the suit and in the relief sought, so intimately connected with that of their co-tenants, that, if these cannot be subjected to the jurisdiction of the court, the bill will be dismissed. *Barney v. Baltimore City*, 6 Wall. 280.

41. The act of Feb. 28, 1839 (set forth in the case), has no application to suits where the parties stand in this position, but has reference, among others, to suits at law against joint obligors in contract, verbal or written. *Id.*

42. (Dec., 1867.) Where a release is fraudulently obtained from one of two joint contractors, the releasing contractor is not an indispensable party to a bill filed by his co-contractor against the other party to the contract. *Canal Co. v. Gordon*, 6 Wall. 561.

43. (Dec., 1868.) Stockholders in a corporation need not be individually made parties in a creditor's suit, where their interest is fully represented both by the railroad company and by a committee chosen and appointed by them. *Railroad Co. v. Howard*, 7 Wall. 393.

44. (Dec., 1868.) In a bill in equity in the Circuit Court by one distributee of an intestate's estate against an administrator, it is not indispensable that such distributee make the other distributees parties, if the court is able to proceed to a decree, either through a reference to a master or some other proper way, to do justice to the parties before it, without injury to absent parties equally interested. *Payne v. Hook*, 7 Wall. 425.

45. The sureties of an administrator on his official bond may properly be joined with him in an equity proceeding, for an erroneous and fraudulent administration of the estate by him, and where, if a balance should be found against the administrator, those sureties would be liable. *Id.*

46. (Dec., 1868.) Where, after a mortgage of it, real property has been conveyed in trust for the benefit of children, both those in being and those to be born, all children *in esse* at the time of filing the bill of foreclosure should be made parties. Otherwise, the decree of foreclosure does not take away their right to redeem. A decree in such a case against the trustee alone does not bind the *cestui que trusts*. *Clark v. Reyburn*, 8 Wall. 318.

47. (Dec., 1869.) It is no objection to such a bill [under the fiftieth section of the National Bank Act of June 3, 1864 (13 Stat. at Large, 116)], properly filed against stockholders within the jurisdiction of the court, that stockholders named in the bill, and averred in it, to be without the jurisdiction, are not made co-defendants. *Kennedy v. Gibson*, 8 Wall. 498.

48. Creditors of the bank are not proper parties to such a bill.

The receiver is the proper party to bring suit, whether at law or in equity. *Ib.*

49. (Dec., 1869.) Where certain heirs-at-law seek to set aside a sale of their ancestor's realty made under a decree of a competent court, ordering, at a creditor's instance, such sale for the payment of a debt due him, they should make the creditor on whose application the sale was made a party. All the heirs also should be parties. It is not enough that those who bring the suit profess to file their bill "for themselves and the other heirs-at-law," these last being known and not numerous. *Hoe v. Wilson*, 9 Wall. 501.

50. (Dec., 1870.) A bill for a settlement of partnership accounts, which, without charging fraudulent confederacy, shows that it is filed, not against all the original partners, but against one of them (yet remaining in the administration of the firm concerns), and persons who have succeeded to the rights (not to the obligations) of one or more of the others, presents not only a want of indispensable parties, but a misjoinder of the defendants, — a misjoinder apparent upon the face of the bill. It must be dismissed. *Bank v. Carrollton Railroad*, 11 Wall. 624.

51. Where a complainant's right is thus only an equity to share in the surplus, if any, of the firm property, after settlement of the partnership accounts, the proper bill is a bill for such a settlement. Such bill will not lie unless all the partners are made parties defendant. *Ib.*

52. Although, in general, a bill in chancery will not be dismissed for want of proper parties, the rule resting as it does upon the supposition that the fault may be remedied, and the necessary parties supplied, does not apply when this is impossible, and whenever a decree cannot be made without prejudice to one not a party. In such a case the bill must be dismissed. Hence, in a case where, if all the partners were made parties to the bill, the court in which the bill was filed would, from the character of its jurisdiction (which was confined to persons resident within particular districts, which one of the partners here was not), be without any jurisdiction of the controversy, the bill must be dismissed. *Ib.*

53. (Dec., 1871.) The proceeds of the sale of the bankrupt's goods being in the hands of one sued as a defendant, another person who had a like judgment and execution, levied on the same

goods, is not a necessary party to this suit, being without the jurisdiction. The rule laid down as to necessary parties in chancery. *Traders' Bank v. Campbell*, 14 Wall. 87.

54. (Dec., 1871.) A mortgagor who, on a bill attempting to charge his mortgagee with reception of profits of the estate, because of a foreclosure which, though void for want of requisite notice of the intended sale in foreclosure, was gone through with in form, has had his bill dismissed, with a decree that he is himself still owner and liable for a balance of unpaid mortgage-money, cannot object, on error, that the decree did not order the heirs of the formal purchaser (the purchaser himself being dead) to convey, if the bill have not made such heirs parties, or if they have not been called in. *Bigler v. Waller*, 14 Wall. 297.

55. (Dec., 1871.) A., B., C., and D., having a dispute about their rights in a railroad company, entered into a contract of settlement, by which they divided the stock in certain proportions among them. A. refused to carry out the contract. B. filed a bill to compel him to stand to his agreement. A., after answering, filed a cross-bill, insisting that B. ought to have made C. and D. parties to his original proceeding. *Held*, that the bill not seeking any relief against B. and C., it was not necessary that they should be parties. *French v. Shoemaker*, 14 Wall. 314.

56. (Dec., 1872.) Where the state is concerned, the state should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission to do it; and the case may proceed to decree against her officers, in all respects as if she were a party to the record. *Davis v. Gray*, 16 Wall. 203.

57. That in deciding who are parties to the suit, the court will not look beyond the record. *Ib.*

58. Making a state officer a party does not make the state a party, although her law may prompt his action, and she may stand behind him as the real party in interest; that a state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case. *Ib.*

59. (Oct., 1873.) Where a person sues in chancery as administrator of a deceased partner, to have an account of partnership concerns, alleging in his bill that he is the sole heir of the deceased partner, the fact that he is not so does not make the bill abate for want of necessary parties; since a decree in his favor

as administrator would not interfere with the rights of others who might claim a distribution after the complainant received the money decreed to him. *Moore v. Huntington*, 17 Wall. 417.

60. (Oct., 1873.) Where the assignees of a claim on a third party, have parted completely with their interest in it, and, by a transfer, vested the entire title in others, they are not necessary parties in an equity proceeding by these others to enforce it. *Batesville Institute v. Kauffman*, 18 Wall. 151.

61. (Oct., 1873.) Where a proceeding in equity concerns the disposal of a specific fund, a person claiming the fund, and liable by a decree to have it wholly swept from him, is an indispensable party. *Williams et al. v. Bankhead*, 19 Wall. 563.

62. The general rules in equity relative to parties, and the qualifications to the rules, stated. *Id.*

63. (Oct., 1874.) If the purchaser from the vendee be dead, leaving a widow his executrix, and heirs-at-law to whom, with her, his real estate has descended, they ought to be made parties defendant to any bill to foreclose. *Lewis v. Hawkins*, 23 Wall. 120.

64. (Oct., 1875.) Where the assignee in bankruptcy of a mortgagor is appointed during the pendency of proceedings for the foreclosure and sale of the mortgaged premises, he stands as any other purchaser would stand, on whom the title had fallen after the commencement of the suit. If there be any reason for interposing, the assignee should have himself substituted for the bankrupt, or be made a defendant on petition. *Eyster v. Gaff*, 1 Otto, 521.

65. (Oct., 1875.) Where a suit, brought by a trustee to recover trust property, or to reduce it to possession, in no wise affects his relations with his *cestuis que trust*, it is unnecessary to make them parties. *Carey v. Brown*, 2 Otto, 171.

66. (Oct., 1876.) Where the object is to divest a *feme covert* or minor of an interest in real estate, the title of which is in a trustee for her use, the trust being an active one, it is error to decree against her without making the trustee a party to the suit. *O'Hara v. McConnell*, 3 Otto, 150.

67. (Oct., 1876.) A purchaser of property *pendente lite* is as conclusively bound by the results of the litigation, as if he had, from the outset, been a party thereto. *Tilton v. Cofield*, 3 Otto, 163.

68. (Oct., 1876.) Prior mortgagees are not necessary parties to the bill of a junior mortgagee, which seeks only the foreclosure or the sale of the equity of redemption. *Jerome v. McCarter*, 4 Otto, 734.

69. (Oct., 1877.) To a bill filed by the assignee in bankruptcy to set aside, as a fraud upon creditors, a conveyance of real and personal property by the bankrupt, the latter is not a necessary party. *Buffington v. Harvey*, 5 Otto, 99.

70. (Oct., 1877.) An assignment by a defendant of his interest in the subject-matter of a pending suit does not necessarily defeat the suit. The assignee is bound by what is done against the assignor; and may either come in and assume the burden of the litigation in his own name, or act in the name of his assignor. *Ex parte Railroad Co.*, 5 Otto, 221.

71. (Oct., 1878.) Except in favor of the [Union Pacific Railroad] company or of the United States, there can, under this act [of March 3, 1873 (17 Stat. 509)], therefore, be no recovery, and none but such as was sanctioned by the principles of equity before it was passed. *United States v. Union Pacific Railroad Co.*, 8 Otto, 569.

72. The company might, by a cross-bill, have availed itself of the act; but it refuses to do so, and demurs to the bill, thereby foregoing any relief in its favor in this suit. As it is conformable neither to the principles of equity nor to those of the common law to render a decree or a judgment in favor of a competent party who asserts no claim and declines to proceed in the case, there can be no recovery in this suit in favor of the company. *Ib.*

73. Though the bill sets up many fraudulent transactions on the part of the directors of the company and some of its stockholders, for which the other stockholders would be entitled to relief, the latter are not parties, and neither the frame of the bill nor the provisions of the act authorize any relief or recovery in their favor. *Ib.*

74. (Oct., 1878.) Where the receiver of the internal improvement fund [of Florida], who was appointed by the court, filed a bill in equity, to determine upon what amount of said bonds [of a railroad company] the purchaser was bound to make such semi-annual payment, — *Held*, that the holders of them were not proper parties complainant. *Doggett v. Railroad Co.*, 9 Otto, 72.

75. (Nov., 1812.) Every person interested in the subject-matter should in general be made a party to a bill in equity. But no one need be made a party against whom, if brought to a hearing, there can be no decree. Therefore a certificated insolvent or bankrupt, if discharged from the particular contract on which relief is sought, need not be made a party. *Reimsdyk v. Kane*, 1 Gall. 371.

76. (Nov., 1820.) It is a general rule in equity that all persons materially interested in the matter of the bill, as plaintiffs or defendants, ought to be made parties to it, however numerous they may be. *West v. Randall*, 2 Mason, 181.

77. But there are exceptions to the rule, as where the other party is without the jurisdiction, &c.; so, part of a crew of a privateer, suing for prize-money; so creditors suing in behalf of all creditors, &c. *Ib.*

78. It seems the better opinion that one heir or next of kin, suing for a distributive share of an estate, cannot maintain his bill in equity, without making the other heirs or next of kin parties, or showing them to be without the jurisdiction, or within some other exception. But the rule on this subject does not seem to be inflexible. *Ib.*

79. But the administrator upon the estate, where the personality is concerned, is a necessary party to such a bill in ordinary cases. *Ib.*

80. (June, 1825.) *Quære*: Whether a devisee of land, in a state where the probate is conclusive, is bound to make the heirs: at-law parties to an original bill in the nature of a bill of revivor to revive a suit against third persons respecting the land. *Slack v. Walcott*, 3 Mason, 508.

81. (Oct., 1838.) In the case of a bill against a banking corporation, to account for certain property held by them as collateral security for debts due them from a third person, and to apply the surplus, after satisfying themselves, to the plaintiff's debt, the debtor is a necessary party to the bill. *Wilson v. City Bank*, 3 Sumn. 423.

82. (May, 1840.) The courts of the United States will dispense with the joinder of those persons whose citizenship, if they were made parties to the suit, would oust the jurisdiction of the court whenever, without prejudice to their rights, the court can proceed to decide the merits of the case as be-

tween the other parties properly before it. *Harrison v. Urann*, 1 Story, 64.

83. (May, 1844.) *Held*, that where a bill in equity is brought to recover a debt against the estate of a deceased partner, the other partners are proper and necessary parties; and although, when they are out of the jurisdiction of the court, they may be dispensed with, yet this exception does not apply to cases (like the present) involving important rights of the absent partners, and especially not to cases where the facts are mainly in their knowledge, or where the circumstances occurred in the place where they are. *Vose v. Philbrook*, 3 Story, 336.

84. (Oct., 1847.) Where an agreement, not under seal, is to account with A., or reconvey to him certain property, and to do the same to B. with other property, and to both with still different estate, as it came in those ways from A. and B., and from both, a separate action lies for A., for his separate proportion. *Jewett v. Cunard*, 3 Woodb. & M. 277.

85. (June, 1852.) An executor or administrator is a necessary party to a bill to enforce a trust concerning property of the deceased. *Allen v. Simons*, 1 Curt. C. C. 122.

86. (Nov., 1854.) Where the amount of a trust fund for creditors is not fixed, and it is necessary to take an account to fix it, all the *cestuis que trust* must be made parties, either as plaintiffs or defendants; and the act of Congress of Feb. 28, 1839 (5 Stat. at Large, 321), does not enable the court to proceed without them, to make a decree distributing parts of the fund to those who are entitled to them in severalty. *Greene v. Sisson*, 2 Curt. C. C. 171.

87. (Nov., 1864.) In this case the bill of complaint was not founded on the title of the original patentee, but on the derivative title of the first-named complainant, to whom, as executor of the patentee deceased, the patent was reissued; therefore, objection to the right of the complainants to maintain their bill, because only one of the persons named as executors in the last will and testament of the original patentee was made a party to the bill, cannot be sustained. *Goodyear v. Providence Rubber Co.*, 2 Cliff. 351.

88. Where other persons named as executors did not join with the complainant in proving the will of the original patentee, or in the surrender or reissue of the original patent, they need not be

made parties to a bill of complaint for the infringement of the said reissued patent. *Ib.*

89. (April, 1825.) The Circuit Courts are not deprived of their jurisdiction, where it arises from the citizenship or alienage of parties, by the joining of a mere nominal party, who does not possess the requisite character. *Ward v. Arredondo*, 1 Paine, 410.

90. But where, in equity, a decree against such party is essential to the relief sought, he is not a mere nominal party. *Ib.*

91. (Nov., 1850.) In a suit in equity against C., to take advantage of a breach of said condition of the license [to use six patented machines within one county], W. is properly joined as a plaintiff with G., although the latter owns the whole of the beneficial interest in the subject-matter; because W. was a party [assignor to G.] to the license, and, for aught that appears, is yet the owner of a portion of the interest in the patent, and, as such, interested in upholding it, and may be interested indirectly in the infringement itself. *Woodworth v. Cook*, 2 Blatchf. 152.

92. (April, 1853.) The question of who are necessary parties to a suit in equity, brought by a defendant in an ejectment suit, to restrain further prosecution, considered. *Segee v. Thomas*, 3 Blatchf. 11.

93. (July, 1857.) Where the legal owner of a patent granted a license to use it, and covenanted not to license any one else, and not to use the patent himself, and the license provided that such owner should have one-half of the damages to be recovered for the violation of the patent, — *Held*, that the legal owner was a necessary party to a suit for an infringement of the patent. *North v. Kershaw*, 4 Blatchf. 71.

94. (July, 1859.) Where one person has the legal title to a patent, and another person has an equitable right in it, both should be joined as plaintiffs in a suit in equity on it, for an injunction and an account, founded on an infringement. *Simpson v. Rogers*, 4 Blatchf. 333.

95. (April, 1860.) Persons having adverse and conflicting interests cannot be joined as co-plaintiffs in a suit in equity. *Parsons v. Lyman*, 4 Blatchf. 432.

96. (April, 1861.) A Circuit Court of the United States will not proceed to a final decree, in a suit in equity, in the absence of a party whose interests are to be affected thereby. *Abbot v. American Hard Rubber Co.*, 4 Blatchf. 489.

97. Where a bill against a corporation alleged that certain directors of the corporation were about to make a fraudulent sale of all the property of the corporation to P., and prayed an injunction to restrain the corporation from consummating the sale, but P. was not made a party to the bill, — *Held*, on demurrer, that P. was not a necessary party. *Ib.*

98. A Circuit Court of the United States will always dispense with a merely formal party, where he is beyond the reach of process; and, where a person is beyond the reach of process, it will dismiss a bill, on the ground of its inability to proceed, only when it discovers that the presence of the person is indispensable, and that no relief can be given which does not necessarily involve his rights. *Ib.*

99. (June, 1861.) Where persons are acting in concert, in infringing a patent, although they act merely as employees of a corporation, they are liable to be sued therefor jointly in one suit. *Poppenhusen v. Falke*, 4 Blatchf. 493.

100. (Sept., 1865.) A bill of peace, founded on the idea that all persons charged with a tax under the ninety-ninth section of the Internal Revenue Act of June 30, 1864 (13 Stat. at Large, 273), have such a unity of interest in contesting the tax, that they may join as plaintiffs in a bill to restrain the assessment and collection of such tax, and that a determinate number of such persons may appear in the name of themselves and for the rest, will not lie. *Cutting v. Gilbert*, 5 Blatchf. 259.

101. To authorize such a joinder of plaintiffs, their interest must be not only one in the question, but one in common in the subject-matter of the suit. *Ib.*

102. (Sept., 1867.) As to parties, all persons who have an interest in the object to be attained by a suit in equity must be joined. *Bunce v. Gallagher*, 5 Blatchf. 482.

103. Those whose interests are in harmony, and only those, should be joined as plaintiffs. *Ib.*

104. A court of equity will hesitate to dismiss a suit for the want of proper, or for the joinder of improper, parties, where the difficulty can be remedied, or where the relief sought can be given without impairing or jeopardizing the interest of any one. *Ib.*

105. (Nov., 1867.) Where it would oust the jurisdiction of this court to make a party plaintiff a person applying to be

made such, he will be made a party defendant, where, by that being done, he can equally have the benefit of the suit. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 526.

106. The forty-seventh and forty-eighth of the rules of practice for the courts of equity of the United States, prescribed by the Supreme Court, applied to the question of parties in this suit. *Ib.*

107. (Jan., 1868.) In a suit in equity on a patent, it is proper to join, as plaintiff, with the owner of the legal title to the patent the party who is immediately injured by the infringement, and who is equitably entitled to the fruits of the recovery in the suit. *Goodyear v. Allyn*, 6 Blatchf. 34.

108. (May, 1868.) Whether, in a suit in equity for an account, for the infringement of a patent, all joint wrong-doers are necessary parties defendant, *quære*. *Goodyear v. Toby*, 6 Blatchf. 130.

109. (June, 1868.) Where, in a suit in equity, brought by alien plaintiffs against citizens of New York, a person, not stated to be a citizen of New York, applied to be made a party to the suit, — *Held*, that he could not be made a defendant, because that would oust the jurisdiction of the court. *Drake v. Goodridge*, 6 Blatchf. 151.

110. The act of Feb. 28, 1839 (5 Stat. at Large, 321), explained. *Ib.*

111. No such practice is known, in equity, as making a person a defendant to a suit on his own application, or as compelling a plaintiff to join, as co-plaintiff, a person not a party on the application of such person. *Ib.*

112. (Aug., 1869.) Where V., as an officer of a corporation which owned the patent issued to N., and on behalf of such corporation, executed a written agreement between the corporation and P., under which the corporation furnished to P., for use by him, under a tariff, as rent, the infringing machines, they remaining the property of the corporation, — *Held*, that V. was a proper party defendant to a suit against P. to restrain the infringement of W.'s patent by the use of such machines. *Nichols v. Pearce*, 7 Blatchf. 5.

113. (March, 1870.) Where a patentee assigns all his right, title, and interest in his invention and patent within and throughout a specified territory, this is such a grant of exclusive right as

warrants a suit in the name of the grantee, for an infringement within such territory. *Perry v. Corning*, 7 Blatchf. 195.

114. (April, 1871.) The cases reviewed, on the question as to when a stockholder in a private corporation will be allowed to file a bill in his own name, on behalf of himself and all others standing in the same situation, making the corporation a party defendant, to compel the ministerial officers of the corporation to account for breach of official duty or misapplication of corporate funds. *Heath v. Erie Railway Co.*, 8 Blatchf. 347.

115. A person not a stockholder cannot be joined as plaintiff, in such a bill, with persons who are stockholders; and, if the suit is a joint one, his want of interest is a good ground of demurrer to the whole bill. *Ib.*

116. If several trustees are all of them implicated in a common breach of trust, for which the *cestui que trust* seeks relief in equity, he may bring his suit against all of them, or against any of them separately, at his election, the tort being treated as several as well as joint. *Ib.*

117. The same doctrine applies to any wrong-doer who is confederated with a fraudulent trustee. *Ib.*

118. It is not necessary that the directors of the corporation should be made parties to the bill, although the bill prays for an injunction against the corporation, and for a receiver of the corporation if no relief is asked as against such directors. *Ib.*

119. (June, 1874.) In a suit in equity, brought on letters-patent for a machine, to restrain the defendant from making the patented machines and selling them to parties who buy them for exportation to, and use in, foreign countries, it is proper to join, as plaintiff, the owner of the legal title to the patent with the holder of the exclusive right to make and vend the patented invention for use in foreign countries. *Dorsey Revolving Harvester Rake Co. v. Bradley Manufacturing Co.*, 12 Blatchf. 202.

120. (June, 1874.) S., in 1860, recovered a judgment against a Wisconsin corporation, in a federal court in Wisconsin, and on a creditor's bill filed by him thereon, in the same court, B., a citizen of Wisconsin, was, in October, 1870, appointed receiver of the property of the corporation. The corporation had, in 1857, hypothecated to L. certain notes and farm mortgages to secure notes of the corporation held by L. This debt passed to D., who, after recovering judgment thereon, proceeded in

equity against the corporation and C., in the same federal court in Wisconsin, to enforce payment of the judgment out of property of the corporation in the hands of C., and obtained a decree in May, 1870, that he recover of C. a certain sum. Subsequently, the debt to L. and the securities therefor, including the last-named decree, passed to H., a defendant in this suit. In June, 1870, H. sold the debt and securities and decree, but retained the farm mortgages, until he should be released from, or indemnified against, responsibility to the corporation therefor. The decree against C. being collectible, B., as receiver, filed this bill against C. and H. to compel satisfaction of such decree, and for the delivery thereupon to him of the farm mortgages, to be applied in satisfaction of the judgment recovered by S. *Held*,—

(1.) That the corporation was a necessary party to this suit.

(2.) That although, under sec. 13 of the act of June 1, 1872 (17 Stat. at Large, 198), an order could be made bringing in the corporation as a defendant, this court would then have no jurisdiction of this suit, as the plaintiff and the corporation would be citizens of the same state.

(3.) That the plaintiff, deriving his authority from a federal court in Wisconsin, could not maintain this suit in this court. *Brigham v. Luddington*, 12 Blatchf. 237.

121. (Oct., 1870.) One who purchases, *pendente lite*, the interest of a defendant in the subject-matter of a suit does not thereby become a necessary party to the suit; and, if the court has no jurisdiction of him, he cannot be compelled to come in as a party. *Myers v. Dorr*, 13 Blatchf. 23.

122. (March, 1878.) Where a bill was brought in the name and right of a firm, by a person claiming to be its sole member, to enforce its right to a method of identifying its wares, and it appeared that the right belonged to the firm, and that there was another member of it who was not a party plaintiff, and the case was a meritorious one, opportunity was allowed to bring in such other member. *Frese v. Bachof*, 14 Blatchf. 432.

123. (April, 1879.) A mere licensee under a patent cannot sue in equity for the infringement of his rights under the patent, without joining with him, as plaintiff, the owner of the legal title; and such owner is in such case a proper party. *Nelson v. McMann*, 16 Blatchf. 139.

124. What constitutes a mere licensee defined. *Id.*

125. The instrument under which the plaintiff in this case claimed his rights held to be only a license. *Ib.*

126. (April, 1806.) A. and B. were indebted to the plaintiff and others; and A. having become insolvent, and a commission of bankruptcy having issued against him, the creditors of A. and B. joined in releasing A. from all the debts due to them from the firm of A. and B. The commission of bankruptcy being superseded, the plaintiffs filed a bill on the equity side of the Circuit Court to set aside the release. *Held*, that all the parties to the release of A. should have joined in the bill; and the demurrer for want of such parties was sustained. *Joy et al. v. Wirtz et al.*, 1 Wash. 417.

127. (Oct., 1806.) A bill on the equity side of the court was filed by all the parties to a release of the defendants, except one, who was a citizen of Pennsylvania. The complainants in the bill were all citizens of another state. To this bill there was a plea to the jurisdiction of the court, alleging the want of jurisdiction, because one creditor was not joined in the bill. *Held*, that the court had jurisdiction of the case. *Joy et al. v. Wirtz et al.*, 1 Wash. 517.

128. (Oct., 1808.) The representatives of a deceased partner need not be made parties to a bill filed by the surviving partner, as they have no claim until the partnership debts are paid, and then it is upon the surviving partner or his representatives. *Pagan v. Sparks*, 2 Wash. 325.

129. (April, 1819.) It is no cause of demurrer for want of parties that a lunatic is not made a party; but it is a good objection for want of parties. For although his committee, if he has one, is made defendant in another capacity, still the lunatic should be a party, and then he answers by his committee. If he has none, the court appoints a guardian to answer for him. *Harrison v. Rowan*, 4 Wash. 202.

130. (April, 1827.) If the jurisdiction of the court could be ousted by making all the parties concerned in interest plaintiffs, those who are citizens of the same state with the real defendants may refuse to join in the suit, and may be made defendants. *Wisner v. Barnet*, 4 Wash. 632.

131. The executor or administrator of the deceased next of kin who might be made a party must be. It is not sufficient to make his devisee, or persons entitled to his estate, parties. *Ib.*

132. (May, 1822.) It is a general rule in equity that all persons having distinct interests must be brought into court. But where the interest of A. is involved in that of B., and A. possesses the legal right, so that the interest may be asserted in his name, it is not always necessary to bring both before the court. *Hopkirk v. Page*, 2 Brock. 21.

133. (June, 1869.) The objection of the want of parties may be taken at any time in the progress of a cause, even in the appellate court. *Carson v. Robertson*, Chase, 475.

134. It will be disregarded whenever taken, if it appears that the parties are not necessary, or if, although convenient, and under some circumstances necessary, they cannot be made without depriving the court of jurisdiction. *Ib.*

135. On the other hand, if it appears that no final decree can be made without material prejudice to the interests of parties not before the court, the court will not proceed without them, even though such parties are beyond the reach of its process, or cannot be made without ousting the jurisdiction. *Ib.*

136. In applying these rules, however, the courts of the United States are always careful to see that no citizen of a state other than that in which the defendants reside shall invoke their jurisdiction in vain, unless it is obviously impossible to protect the interests of the absent parties in their decrees. *Ib.*

137. They will strain a point in favor of the constitutional right of citizens of the United States to sue the citizens of the other states in the courts of the United States. It is a right too clear and too important to be lightly disregarded. *Ib.*

138. (June, 1869.) The agent cannot be sued along with the debtor for the amount of the debt, without an averment of the insolvency of the debtor. *Anderson v. The Bank*, Chase, 535.

139. (June, 1874.) Where a state of the Union is a party in interest, but not a party to the record, the jurisdiction of the United States Circuit Court attaches, where that court has jurisdiction of the state's agent who has charge of the property as a trustee, and where the property which is the subject of the suit is stock or shares in a railroad company, held by it in pledge for the security of a debt due to the complainant, for which a lien has been given by the state "in addition" to the pledge. *Swasey v. North Carolina Railroad Co.*, 1 Hughes, 17.

140. (June, 1878.) On a deed of assignment to a trustee to

secure creditors whose debts were all ascertained, and who were marshaled by the deed into four classes, a bill in chancery was brought by one of the fourth class against the trustee's executrix, for a breach of trust by the trustee. *Held*, (1) that it was not necessary to make the other creditors parties to the suit; (2) that at all events it was too late to make such an objection at the hearing. *Dorr v. Gibboney's Executrix*, 3 Hughes, 382.

141. (Nov., 1871.) An executor may bring a bill to protect the property of the estate of which he is executor from sale on execution issued on a judgment against him personally, without joining the legatees or other persons entitled to the estate after payment of the debts. *Labitut v. Prewett*, 1 Woods, 144.

142. (May, 1872.) Land was conveyed to a trustee, the vendor retaining a vendor's lien for a part of the purchase-money. The grantee conveyed to a trustee, who took the title in trust for a joint-stock company, and went into possession. The original vendor prosecuted a proceeding to foreclose his vendor's lien, without making the trustee a party. *Held*, that the right of the company to redeem was not foreclosed. *King v. Young Men's Association*, 1 Woods, 387.

143. In such a case, the proper party to file a bill to redeem would be the trustee. But where the trustee had been removed, and the directors of the company had failed to appoint a new trustee, the stockholders might file a bill to redeem. *Ib.*

144. (Jan., 1871.) The receiver of the property and effects of a railroad corporation appointed by a court of equity represents the creditors of the corporation, so that, in a suit brought by the receiver to protect the property of the company, the creditors are neither necessary nor proper parties. *Gray v. Davis*, 1 Woods, 421.

145. (Nov., 1872.) An executor or administrator is the trustee and proper representative of all persons interested in the personal estate, and until the final distribution of the estate holds both the legal and equitable title thereto.

Consequently, when he is made a party to a bill filed by a distributee to sell the personal property of an estate and divide the proceeds, the other distributees are not necessary parties. *Alston v. Cohen*, 1 Woods, 487.

146. (Nov., 1873.) In a suit in equity for a demand due to a partnership, all the partners must be joined, either as complain-

ants or defendants. They are not merely proper, but necessary parties. *Parsons v. Howard*, 2 Woods, 1.

147. (Sept., 1875.) If two railroad corporations created by different states join in making a trust deed conveying their property, to secure bonds issued by them jointly, and suit is brought to enforce the trust in the district where one of the corporations resides, and it is served with process, and the other corporation, being a non-resident of the state or district where the suit is brought, enters its appearance and files an answer jointly with the other, both will be bound by the decree of the court. *Wilmer v. Railway Co.*, 2 Woods, 447.

148. (June, 1875.) Where a state is concerned in the subject-matter of the suit, it should be made a party, if that can be done; but the fact that the state cannot be sued is a sufficient excuse for not making it a party. *Young v. Railroad Co.*, 2 Woods, 606.

149. Where a state was an indorser of bonds secured by a statutory mortgage, it was not considered a necessary party to a suit brought by holders of bonds secured by the mortgage, to foreclose the same. *Ib.*

150. Junior mortgagees may file a bill to foreclose their mortgage, without making prior mortgagees parties; but a sale in such a case would necessarily be made subject to the prior mortgages. *Ib.*

151. (July, 1873.) A complainant cannot be compelled to add new parties to his bill, if he chooses to take the responsibility of their not being made parties. *Searles v. Railroad Co.*, 2 Woods, 621.

152. (Jan., 1879.) A bill filed against the Commissioner of the General Land-Office of Texas, to restrain him from allowing locations of land within the limits of the grant made to a party under whom complainant claimed, and which was afterwards confirmed by the State of Texas, is not a suit against the state. *Hancock v. Walsh*, 3 Woods, 351.

153. (April, 1877.) When one of two joint mortgagors conveyed absolutely to the other his equity of redemption, — *Held*, that he was not a necessary party to a bill to foreclose. But his right to redeem, in case the mortgaged property did not satisfy the mortgage debt, would not be foreclosed by the decree. *Townsend Savings Bank v. Epping*, 3 Woods, 391.

154. Without being a party, he would be bound by an account taken to ascertain the sum due on the mortgage, unless he could show collusion. *Ib.*

155. Courts of equity are always unwilling to turn a complainant out of court, on an objection for want of proper parties made at the final hearing. If they deem it necessary that a new party be made, they will generally allow the cause to stand over for that purpose. *Ib.*

156. A mortgage lien was paramount to a claim for homestead in the mortgaged premises. *Held*, that the wife of the mortgagor was not a necessary party to a bill to foreclose. The right to homestead was to be considered in the light of a subsequent incumbrance. *Ib.*

157. The wife is only interested to see that the mortgage shall not absorb more than it ought, to the detriment of the homestead; and the husband, being primarily liable on the mortgage note, is the only necessary party to be present at the taking of the account. Such account will be binding on persons only collaterally liable, unless collusion is shown. *Ib.*

158. (Nov., 1878.) A bill in equity which seeks to take from the possession of a state, property possessed and claimed by it, and to subject it to the payment of bonds, which the bill alleges were indorsed by the state, but which indorsement the state denies, though nominally brought against the governor and other state officers, is in substance a suit against the state, and cannot be maintained in a court of the United States, on the theory that the state has assumed the duties of a trustee for the holders of said bonds. *Cunningham v. Railroad Co.*, 3 Woods, 418.

159. (Oct., 1860.) H., by virtue of the rights reserved to him [in his license to M. A. & Co. to make and sell a patented invention within certain territory], must be viewed as a "party aggrieved," in the words of sec. 17 of the act of July 4, 1836, and he had an undoubted right to proceed in equity, for the protection of his rights, without joining M. A. & Co. as parties complainant. *Hussey v. Whitely*, 1 Bond, 407.

160. (July, 1829.) The plaintiff who seeks the legal title from one who had notice of his equity, must make the person a party from whom his equity is derived. *Smith v. Shane & Meigs*, 1 McLean, 22.

161. (Dec., 1830.) Where an individual is made a party, who

is not within the jurisdiction of the court, on filing his answer and disclaiming all interest in the case, the bill may be dismissed as to him, and the court may sustain jurisdiction as to the other parties. *Hinde v. Vattier*, 1 McLean, 110.

162. Where the bill assigns as a reason for not making a person a party, that he is not within the jurisdiction of the court, the court will take cognizance of the cause in certain cases. *Ib.*

163. (Dec., 1838.) The assignees of an equity are necessary parties. They may assert their right through their assignees, therefore they are interested, and may have grounds of equity which cannot be asserted by the assignor. *Longworth v. Taylor*, 1 McLean, 395.

164. That the vendor may be harassed with another suit, is a sufficient ground to object that the assignees are not parties. *Ib.*

165. (June, 1847.) By statute, an action of ejectment, in Michigan, must be brought against the tenant in possession. If no one be in possession, suit must be brought against any one exercising acts of ownership over the premises, or who claims title thereto.

A bill was filed by complainant, representing that he had purchased and paid for the land, and prayed that a title might be decreed, and for an injunction, &c. It was objected that the name of Hyde, the complainant, is not known in the proceeding at law.

The court required the tenant in possession to be named as co-complainant. *Hyde v. Folger*, 4 McLean, 255.

166. (May, 1853.) Persons or corporations interested must be made parties, especially where the object of the bill cannot be attained without seriously affecting the interests of such persons or corporations. *Railroad Co. v. Railroad*, 5 McLean, 444.

167. (June, 1855.) All persons interested should be made parties to a bill to foreclose a mortgage. *Matcalm v. Smith*, 6 McLean, 416.

168. This is indispensable where a party may be chargeable with any balance which the sale of the mortgaged premises may not satisfy. *Ib.*

169. (Feb., 1869.) In a proceeding to foreclose a mortgage, all persons holding the equity of redemption of the lands, or any part thereof, must be made parties. *Wyman v. Russell*, 4 Biss. 307.

170. (Oct., 1874.) A corporation created by the laws of another state, although associated with one of this state, and hav-

ing common interest with it, is entitled to file a bill in this court and claim its protection. *Railroad Co. v. Railroad Co.*, 6 Biss. 219.

171. (Oct., 1868.) The register and receiver of the land-office have no personal interest in the public lands, or in lands claimed to be such.

An injunction bill against such officers as sole defendants, to restrain them from permitting settlers on lands treated by the Land Department as public lands, entering them under the pre-emption laws, when such settlers are not before the court, is fatally defective for want of parties. *Litchfield v. The Register & Receiver*, Woolw. 299.

172. Parties whose interests in the subject-matter of the suit, and in the relief sought, are so bound up with those of the other parties that their legal presence in the proceeding is absolutely necessary, must be brought before the court, or it will refuse to entertain the suit. *Ib.*

173. It is no answer to such an objection, that it is impossible to bring such parties before the court. *Ib.*

174. (Oct., 1869.) A corporation which has conveyed its property in trust to secure a debt, retains the real ownership, although the legal title and right of possession is in the trustee. It is a necessary party to a suit to vindicate its rights in respect of such property, as against a wrong-doer. *Samuel v. Holladay*, Woolw. 400.

175. (1870.) The next of kin of a patentee cannot be united as parties plaintiff with the personal representative, in a bill to enjoin the infringement of the rights secured by the patent, and for an accounting. *Hodge v. North Missouri Railroad*, 1 Dill. 104.

176. Upon the death of the inventor, the title to the patent issued passes to the personal representative at the domicile of the patentee, who may sue for an infringement in any of the courts of the United States having jurisdiction. It is not necessary that letters should be taken out in the state in which the suit is brought. *Ib.*

177. (Aug., 1846.) There is no jurisdiction to entertain a bill to enjoin a judgment at law in the Circuit Court, brought by a citizen of Tennessee, not a party to the judgment, against a citizen of Mississippi, the plaintiff in the judgment. *Williams v. Byrne*, Hempst. 473.

178. (July, 1855.) If a joint interest is vested in the defendants with absent parties, the court has no jurisdiction; if the interest is separable, the jurisdiction attaches. *Tobin v. Walkinshaw*, McAll. 26.

179. Where any necessary party is within the jurisdiction of the court, and is not made a party, there is no jurisdiction, save in case the parties are so numerous as to bring the case within the exception to the rule. *Ib.*

180. Where a bill omitted to make two persons who were necessary, parties, and who were within reach of process, and where there were absent parties without the jurisdiction of the court, and the bill prayed for cancellation of conveyances in which those absent parties were interested, the court had no jurisdiction of the case. *Ib.*

181. (March, 1870.) There is no rule of law or public policy which requires the national courts to discourage suitors from seeking redress in those tribunals; and parties have a clear right to become the owners of property for the express purpose of maintaining a suit in such courts concerning the same. *Newby v. Railway Co.*, 1 Sawyer, 63.

182. The inability of a party to sue in the national courts, in a particular case, is no test of his liability to be sued in them, under other circumstances. *Ib.*

183. (Feb., 1871.) Whenever the making of a person a party to a bill would oust the jurisdiction of the court as to other parties, such person, if not an indispensable party, may be omitted for the purpose of exercising jurisdiction as to other parties whose rights can be determined without his presence. *Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.*, 1 Sawyer, 470.

184. A person residing out of the jurisdiction of the court, though named as defendant in a bill, is substantially not a party to the action till service of process or appearance. *Ib.*

Rule 48. — Parties Numerous.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and

the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

1. (Dec., 1870.) Where the trustees of a railroad mortgage or deed of trust are dead, a bill of foreclosure and sale may be filed against the company by one or more of the bondholders, on behalf of themselves and all other bondholders secured by the same mortgage; or, if there be several successive mortgages, the trustees of which are dead, and the complainants hold bonds secured by each mortgage, the bill may be filed on behalf of themselves and all the bondholders under each mortgage. *Galveston Railroad v. Cowdrey*, 11 Wall. 459.

2. (March, 1871.) It is not necessary that all the holders of the bonds of a railroad company should be made parties to a bill of foreclosure brought by the trustees of a mortgage by which the bonds are secured. *Campbell v. Railroad Co.*, 1 Woods, 368.

3. Where there are trustees of successive mortgages, and the trustees of a prior mortgage file a bill to foreclose the same, all the bondholders under a subsequent mortgage need not be made parties to the suit, in order to make the proceedings valid and binding on all. *Ib.*

4. Where the bondholders secured by a mortgage on a railroad are numerous, it is not necessary to make all of them parties to a suit, or to make any of them parties, if their trustees are parties. *Ib.*

5. In a case where the parties are numerous, a suit brought by or against some in behalf of all will be binding on all. The parties who are not named may intervene and make themselves actual parties, so long as the proceedings are *in fieri*, and are not definitely closed by the course and practice of the court. *Ib.*

6. Bondholders secured by a mortgage, if aggrieved by a decree rendered in a suit to which the trustee of the mortgage was a party, can intervene and become actual parties, and then make such application to the court for relief as is competent for parties to make in the same suit; or they may institute such other auxiliary, revisory, or supplemental proceedings as a party to the suit might institute. *Ib.*

7. Where complainants are allowed to dispense with parties on account of their numerousness, any one of whom would have

the right to come in by petition, such complainants ought to proceed in the utmost fairness and good faith in procuring a final decree which is to be binding on all. *Ib.*

8. (Sept., 1875.) Where certain bondholders whose bonds were secured by a deed of trust, filed in behalf of themselves and all other bondholders whose bonds were secured by the same deed, who chose to come in as complainants and bear their share of the expenses of the suit, a bill against the trustees named in the deed, to have the trust administered and the trust property sold and its proceeds distributed, and the other bondholders were numerous and some of them unknown, — *Held*, that it was not a valid objection to the making of a decree in accordance with the prayer of the bill, that all the bondholders were not made actual parties; they might be allowed to come in as complainants, or might propound their claims before the master. *Wilmer v. Railway Co.*, 2 Woods, 447.

Rule 49. — Parties. Trustees. Beneficiaries.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators, in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

Rule 50. — Party. Heir-at-law. Suits to execute Trusts of Will.

In suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiffs shall be at liberty to make the heir-at-law a party where he desires to have the will established against him.

Rule 51.—Parties Defendant, upon Joint and Several Demand.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

Rule 52.—Setting down Cause, upon Objection for Want of Parties.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following, (that is to say:) "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

Rule 53.—Decree saving Rights of Absent Parties.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

Rule 54.—Nominal Parties to Bills. Answer. Costs.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpœna upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

Rule 55. — Injunction.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction — either the common injunction or a special injunction — is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

Injunction. Motion for Allowance.

1. (Oct., 1865.) The motion for injunction is addressed to the discretion, and the court may or may not, according to the circumstances, order issues for a jury. [This was a bill founded on letters-patent.] *Ayling v. Hull*, 2 Cliff. 494.

2. (Feb., 1854.) The course of practice stated, on a motion for a provisional injunction to restrain the infringement of letters-patent. *Day v. New England Car-Spring Co.*, 3 Blatchf. 154.

3. (Dec., 1854.) This court will not, on affidavit, and on the hearing of an application for an injunction, founded on a bill which avers the citizenship of a defendant, dispose of the objection that he is an alien, unless the fact of such alienage is indisputably clear. Where such alienage is to be set up, it must be pleaded, particularly where he is resident in the United States, and is transacting business there. *Rateau v. Bernard*, 3 Blatchf. 244.

4. (Jan., 1859.) On a motion for a provisional injunction, for the alleged violation of a copyright for a map, a reference will not be made to a master to examine the rival maps, and report the facts, with his opinion. *Smith v. Johnson*, 4 Blatchf. 252.

5. Such a motion must be disposed of on the moving papers of the plaintiff and the affidavits on the part of the defendant. *Ib.*

6. (Sept., 1867.) A reference being made to a master to take an account, an injunction was withheld until the coming in of his report. *Yale & Greenleaf Manufacturing Co. v. North*, 5 Blatchf. 455.

7. (Nov., 1867.) Under the statute of the United States, which requires reasonable previous notice of an application for injunction to be given to the adverse party, notice to a corporation, at its office, is notice to the directors of such corporation. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525.

8. A defendant, whose affidavit is used to oppose an application for an injunction, is concluded from setting up a want of sufficient notice of such application. *Ib.*

9. Service of notice of such application on a corporation, at its office, cannot be considered as service on such shareholders of the corporation as are not directors of it. *Ib.*

10. In regard to granting an injunction, it is regular to proceed against defendants who have been served with process or notice, and are before the court, although other defendants have not been served. *Ib.*

11. (Jan., 1872.) In opposition to a motion for an injunction, a general allegation, by affidavit, on information and belief, that the thing patented existed before, without disclosing the particulars of the information leading to the belief, is insufficient. *Young v. Lippman*, 9 Blatchf. 278.

12. A separate affidavit, by the plaintiff, of his belief that the patentees were the original and first inventors of the thing patented, dispensed with, the bill having in it such an averment, and having been sworn to eleven days before it was filed and notice of application on it for the injunction was given. *Ib.*

13. (Oct., 1878.) After a motion for a preliminary injunction, in a suit in equity for the infringement of letters-patent, had been heard, and before it was decided, the defendants filed a paper withdrawing their opposition to the motion. Thereupon the court granted the injunction, and refused to make any other decision on the motion, although the plaintiff insisted that the motion should be decided on the merits, with a view to other cases. *American Middlings Purifier Co. v. Vail*, 15 Blatchf. 315.

14. (Oct., 1855.) Chancery will not grant an injunction, nor appoint a receiver, pending a plea to its jurisdiction; but to guard against the abuse of dilatory pleas, or any irreparable mischief, the court will order an immediate hearing or trial of the plea. *Ewing v. Blight*, 3 Wall. Jr. 139.

15. (Nov., 1868.) An application for an injunction having

been made in the United States Circuit Court, and the defendant served with notice thereof, all jurisdiction of the state courts in regard to matters cognate thereto is ousted, or must be exercised in subordination to the jurisdiction of the federal court. *Shoemaker v. French*, Chase, 267.

16. (Nov., 1873.) A court of equity will not grant a mandatory injunction, upon a preliminary or interlocutory motion, but only upon final hearing, and then only to execute the decree or judgment of the court. *McCauley v. Kellogg*, 2 Woods, 13.

17. (July, 1873.) A justice of the Supreme Court, prior to the "Act to further the administration of justice," of June 1, 1872 (Rev. Stat. s. 719), could grant an injunction at any place, in or out of the circuit in which the suit was instituted. *Searles v. Railroad Co.*, 2 Woods, 621.

18. By the seventh section of that act, it is provided that no justice of the Supreme Court shall grant injunctions, except within the circuit to which he is allotted, and in causes pending therein, or in such causes at such place outside of the circuit as the parties may, in writing, stipulate, except in causes where such application cannot be heard by the circuit or district judge. *Ib.*

19. As the circuit or district judge cannot hear the application when absent from the circuit, the case is then within the exception of the statute, as well as when they cannot hear it for any other cause; and the Supreme Court justice may hear the application at any place where he may be. *Ib.*

20. (June, 1866.) The national courts cannot order temporary injunctions, except on reasonable notice to the adverse party or his attorney. *Mowrey v. Railroad Co.*, 4 Biss. 78.

21. (April, 1868.) On the filing of a bill praying an injunction, it is proper practice for the court to make an order that the defendants do nothing prejudicial to the rights or interests of the complainants pending the hearing of the motion for the injunction. *Fanshawe v. Tracy*, 4 Biss. 490.

22. (June, 1870.) On filing a bill for an injunction, it is not competent for the complainant to fix a time for hearing the motion for an injunction so far ahead as to embarrass the defendant. The court will, on application, anticipate the rule-day. *Walworth v. Board of Supervisors*, 5 Biss. 133.

23. (Oct., 1875.) Affidavits, evidently intended to be used in a case, but not entitled in it, will be allowed to be read on motion for injunction. *Shook v. Rankin*, 6 Biss. 477.

24. (1873.) Where the judge of the District Court for the district in which a bill in equity is brought, and the circuit judge for the circuit, and the justice of the Supreme Court allotted to that circuit, are all absent from the district and circuit, another justice of the Supreme Court has jurisdiction, at any place in the United States, to hear an application for an injunction, notwithstanding the act of Congress of June 1, 1872. [See Rev. Stat. s. 719.] *United States v. Canal Co.*, 4 Dill. 601.

25. (July, 1858.) On a motion for injunction to enjoin waste, the complainant cannot, on bill and answer, read affidavits in support of his title. *United States v. Parrott*, McAll. 271.

Injunction Bond.

1. (Dec., 1851.) The proper condition of an injunction bond is "to answer all damages which the defendant may sustain in consequence of the injunction being granted." *Bein v. Heath*, 12 How. 168.

2. Where a bond was given in order to obtain an injunction to suspend proceedings under an order of seizure and sale, and the condition was that the principal and sureties "would pay to the plaintiff, in the case of seizure and sale, all such damages as he may recover against us, in case it should be decided that the said injunction was wrongfully obtained," this bond was irregular. *Ib.*

3. It conformed to the Louisiana practice, by which, if an injunction be dissolved, judgment is at once given for the debt, interest, and damages, against the principal and sureties in the injunction bond. *Ib.*

4. But the equity practice in the courts of the United States is regulated by the laws of Congress and the rules of this court made under the authority of an act of Congress; and one of those rules is, that, when not otherwise directed, the practice in the High Court of Chancery in England shall be followed. *Ib.*

5. According to these rules, a court of equity cannot, when it dissolves an injunction, give judgment at the same time against the obligors. It merely orders the dissolution, leaving the obligee

to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction. *Ib.*

Injunctions. Awarded or denied.

1. (Feb., 1807.) A court of the United States cannot enjoin proceedings in a state court. *Diggs v. Wolcott*, 4 Cranch, 179.

2. (Feb., 1812.) A state court has no jurisdiction to enjoin a judgment of the Circuit Court of the United States. *M'Kim v. Voorhies*, 7 Cranch, 279.

3. (Feb., 1820.) Where a bill was filed for a perpetual injunction, on judgments obtained on certain bills of exchange drawn by the plaintiff, and negotiated to the defendant, and which had subsequently passed from the latter into the hands of third persons, by whom the judgments were obtained, — *Held*, that the injunction could not be decreed until their answers had come in, although the bill stated, and the defendant admitted, that he had paid the judgments, and was then the only person interested in them; because such statement and admission might be made by collusion. *Marshall v. Beverley*, 5 Wheat. 313.

4. (Feb., 1824.) An injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it by attempting to participate in its exclusive privileges. *Osborn v. Bank of United States*, 9 Wheat. 739.

5. In general, an injunction will not be allowed, nor a decree rendered, against an agent, where the principal is not made a party to the suit. But if the principal be not himself subject to the jurisdiction of the court (as in the case of a sovereign state), the rule may be dispensed with. *Ib.*

6. A court of equity will interpose by injunction to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner, such as negotiable securities and stocks. *Ib.*

7. (Jan., 1827.) An injunction out of the Circuit Court, to stay proceedings on a judgment at law in that court, may issue, notwithstanding the pendency of a writ of error on the judgment in this court. *Parker v. The Judges*, 12 Wheat. 561.

8. An injunction issued by order of the district judge expires at the next term of the court, unless continued by the court; but the denial of several successive motions to dissolve the injunction

may, under circumstances, be considered as equivalent to an order for renewing it. *Ib.*

9. (Jan., 1846.) Although a Circuit Court, sitting as a court of law, may direct credits to be given on a judgment in favor of the United States, and consequently examine the grounds on which such an entry is claimed, and may direct the execution to be stayed until such an investigation shall be made, yet it cannot entertain a bill on the equity side praying that the United States may be perpetually enjoined from proceeding upon such judgment. *United States v. McLemore*, 4 How. 286.

10. (Jan., 1847.) The general principle with regard to injunctions after a judgment at law is this: that any fact which proves it to be against conscience to execute such judgment, and of which the party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will authorize a court of equity to interfere by injunction to restrain the adverse party from availing himself of such judgment. *Truly v. Wanzer*, 5 How. 141.

11. (Jan., 1847.) In this case the pleadings and proofs show that a mortgage, executed by the debtor to the creditor, was really for an unascertained balance of accounts, which the sum named in the mortgage was supposed to be sufficient to cover.

As it did not prove to be sufficient, and the creditor obtained a judgment against the debtor for the residue, the payment of the sum named in the mortgage was no reason for an injunction to stay proceedings upon the judgment. *Gear v. Parish*, 5 How. 168.

12. (Jan., 1850.) Where the United States, as indorsees of a promissory note, recovered judgment against the makers thereof, who thereupon filed a bill upon the equity side of the court, and obtained an injunction to stay proceedings, this injunction was improvidently allowed. *Hill v. United States*, 9 How. 386.

13. The United States were made directly party defendants; process was prayed immediately against them, and they were called upon to answer the several allegations in the bill. *Ib.*

14. This course of proceeding falls within the principle that the government is not liable to be sued, except by its own consent, given by law. *Ib.*

15. (Dec., 1851.) Where there is a private injury from a

public nuisance, a court of equity will interfere by injunction. *Pennsylvania v. Wheeling, &c. Bridge Co.*, 13 How. 519.

16. (Dec., 1872.) The doctrines of *Osborn v. The Bank of the United States* affirmed, and the principles redeclared:—

That a Circuit Court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant. *Davis v. Gray*, 16 Wall. 203.

17. (Oct., 1874.) The court will not, on any ground, issue an injunction to stay taxation by state authorities of land granted by the United States to a state corporation for the purpose of public improvements, when it is in doubt as to the meaning of certain statutes, federal and state, on which the prayer for relief by injunction is prayed. *Honeywell v. Cass County*, 22 Wall. 465, 662.

18. (Oct., 1875.) Except where otherwise provided by the bankrupt law, the courts of the United States are expressly prohibited, by sec. 720 of the Revised Statutes, from granting a writ of injunction to stay proceedings in a state court. *Haines v. Carpenter*, 1 Otto, 254.

19. (Oct., 1877.) Except in cases arising under the bankrupt law, a court of the United States cannot enjoin a party from proceeding in a state court. *Dial v. Reynolds*, 6 Otto, 340.

20. (May, 1827.) A judgment may be enjoined in part, and allowed to proceed for the residue. *Dunlap v. Stetson*, 4 Mason, 349.

21. (Oct., 1846.) An injunction in chancery, as a preventive remedy merely, in case of an alleged encroachment on a copyright, is a more ample and appropriate remedy than any suit at law; and hence, when it is asked, and an account and disclosure of facts desired, they will be required, in order to settle the question in controversy. *Pierpont v. Fowle*, 2 Woodb. & M. 23.

22. (Oct., 1855.) The fifth section of the act of March 2, 1793 (1 Stat. at Large, 334), which forbids this court to grant an injunction to stay proceedings in a state court, does not restrain it from enjoining a sheriff from levying on the property of A., on a process against B. *Cropper v. Coburn*, 2 Curt. C. C. 465.

23. (Oct., 1855.) Since the decision of *Poor v. Carleton* (3 Sumn. 70), the practice of this court has been settled, that the denial of the plaintiff's title in an answer does not prevent

the court from awarding a special temporary injunction. *Clum v. Brewer*, 2 Curt. C. C. 506.

24. (March, 1874.) The Circuit Court has jurisdiction in equity, on bill or petition filed, and proper case made, to restrain the use of its process by the marshal in a manner contrary to law. *Gibbs v. Usher*, 1 Holmes, 348.

25. (April, 1813.) An injunction to stay proceedings in ninety-two suits in ejectment, where the parties, pleadings, title, and testimony were the same in each suit, until one or more could be tried, the remainder to abide the event, refused. A court of law can afford the necessary relief in such a case, if it be proper, by a consolidation rule. *Peters v. Prevost*, 1 Paine, 64.

26. (March, 1846.) This court has no power to restrain or interfere with a suit prosecuted and pending in a state court, by enjoining the further prosecution of such suit. *City Bank v. Skelton*, 2 Blatchf. 14.

27. But this court, in executing a jurisdiction vested in it, may, in a case of which it has cognizance, act upon parties who are suitors in a state court, in relation to the same subject-matter, so far at least as to compel their submission to such judgment as this court may render in the case. *Ib.*

28. Where funds were deposited in a bank, and afterwards S., claiming the funds as his property, commenced a suit for their recovery, in a state court, against the bank and Y., the depositor of the funds, and, while that suit was pending, Y. commenced two suits in this court against the bank, to recover the funds and damages for their detention, the bank having no interest in the funds, — *Held*, on a bill filed in this court by the bank against S. and Y., that although this court would not decree an interpleader in the case, or enjoin the suit in the state court, yet it would enjoin the prosecution by Y. of his suits in this court until the final decision of the suit in the state court. *Ib.*

29. *Held*, also, that this court would give the parties the option to consent by stipulation to interplead in this court on the subject-matter, and, in case they did so, would allow the bank to pay the funds into court, first deducting such costs and expenses as the court should allow. *Ib.*

30. (July, 1846.) This court has power, in a proper case, to prohibit a non-resident plaintiff from prosecuting an action against a defendant residing within this state. *City Bank v. Skelton*, 2 Blatchf. 23.

31. The Circuit Courts of the United States have power to control and stay actions pending before them, either by order on the common-law side of the court or by injunction on the equity side. *Ib.*

32. But they will not exercise such authority over actions pending in a state court; nor will a state court interfere with actions pending in the federal courts. *Ib.*

33. The decision in this same case (*ante*, p. 14), that this is a proper case for this court to stay by injunction an action at law pending here, reviewed and affirmed. *Ib.*

34. (Aug., 1858.) The writ of injunction ought, as a general rule, to contain a concise description of the particular acts or things in respect to which the party is enjoined, and ought not merely to refer to the bill of complaint for the description of the thing enjoined. Otherwise it cannot be the foundation for an attachment against any person, except, perhaps, a defendant who has been served with the bill. *Whipple v. Hutchinson*, 4 Blatchf. 190.

35. (July, 1862.) A provisional injunction granted on the filing of the bill, falls with the dismissal of the bill. *Coleman v. Hudson River Bridge Co.*, 5 Blatchf. 57.

36. The provisions of the acts of Sept. 24, 1789 (1 Stat. at Large, 85, s. 23), and March 3, 1803 (2 id. 244, s. 2), do not operate to continue such injunction. *Ib.*

37. (Sept., 1865.) By virtue of the second section of the act of March 2, 1833 (4 Stat. at Large, 632), and the fiftieth section of the act of June 30, 1864 (13 id. 241), the proper court of the United States has power to prevent, by injunction, the imposition of an illegal tax under the latter act. *Cutting v. Gilbert*, 5 Blatchf. 259.

38. Where a great number of persons are affected by a tax, and the remedy by separate suits in equity will involve onerous and vexatious litigation, the court will not interfere by injunction in any suit. *Ib.*

39. (Dec., 1868.) An order for an injunction or a receiver will not be made in an improper case, even on the consent of both parties to the suit, more especially where the rights of third parties may be concerned. *Whelpley v. Erie Railway Co.*, 6 Blatchf. 271.

40. (April, 1873.) T., a resident of Kentucky, and a creditor

of a national bank incorporated under the act of Congress of June 3, 1864 (13 Stat. at Large, 99), and located in Alabama, brought a suit against it, in the Supreme Court of New York, to recover a debt alleged to be due from the bank to him, and, in such suit, attached certain moneys in the possession of a national bank in New York, as the property of the Alabama bank. The suit was commenced by attachment and publication of the summons. C., who was appointed receiver of the Alabama bank, under the provisions of the said act, was, on his own application, substituted as defendant in such suit, in place of the Alabama bank, with the like force and effect as if the suit were continued in the name of said bank, and thereupon put in an answer therein, setting up a want of jurisdiction in the state court, over him, as an officer, or over the bank, or over the subject of the action, and other defenses. The suit was tried, and a judgment was rendered, that T. recover of C., as receiver of the bank, a certain sum, "to be levied and collected of the moneys and property whereon an attachment has been heretofore levied in this action." Afterwards C. filed a bill in equity in this court, against T. and the New York bank, praying for an injunction against T. from proceeding further on his attachment, or on any judgment in the suit in which such attachment was issued, and for the payment to him, C., of the moneys in the hands of the New York bank. The Code of Procedure of New York (sec. 227) provides, that in an action arising on contract, for the recovery of money only, "against a corporation created by, or under the laws of, any other state, government, or country," the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of such corporation attached, in the manner thereafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover. The same code (sec. 427) provides, that an action "against a corporation created by, or under the laws of, any other state, government, or country," may be brought in the Supreme Court of New York, by a plaintiff not a resident of the State of New York, "when the cause of action shall have arisen, or the subject of the action shall be situated, within the state." The bill proceeded on the ground that the state court had no jurisdiction of the suit against the Alabama bank, because it could not acquire jurisdiction, *in invitum*, of a suit against a corporation created

under said act, and also because the cause of action in such suit did not arise within the State of New York. *Held*, —

(1.) That, so far as the provision of sec. 427 of the Code of New York was concerned, the Supreme Court of New York had jurisdiction over the suit.

(2.) That the effect of the provisions of the fifty-seventh section of the said act of June 3, 1864, was to deprive the state court of jurisdiction over the suit.

(3.) That C. was not estopped, by the proceedings in the suit in the state court, from questioning the jurisdiction of that court over him, or its jurisdiction to render against him the judgment which it did render.

(4.) That C. was entitled to the relief prayed for. *Cadle v. Tracy*, 11 Blatchf. 102.

41. A national bank incorporated under said act can be sued only in the courts designated in the fifty-seventh section thereof. *Ib*.

42. (April, 1874.) In a suit in equity in this court, on letters patent, containing four claims against two defendants, J. and G., the plaintiff had a decree adjudging infringement of the fourth claim, and an account of profits, and an injunction. The accounting was proceeded with. One of the defendants, G., was called as a witness for the plaintiff, on the accounting, and objected to giving certain information asked, on the ground that the inquiry went beyond the scope of the claim infringed, until the defendants could apply to this court for instructions. The plaintiff then brought a suit in equity in New Jersey, on the same patent, against G. alone, claiming to recover in it, for the time covered by the suit in this court, damages for the infringement covered by the suit in this court (such damages not being claimed in the bill in the suit in this court, it having been filed before the enactment of the fifty-fifth section of the act of July 8, 1870, 16 Stat. at Large, 206), and also profits and damages for the infringement of the patent after the date of the decree in the suit in this court. Proofs for final hearing were taken and closed in the suit in New Jersey. The plaintiff also brought suits for infringement in South Carolina and Georgia, against persons who had infringed only by selling articles bought by them from the defendants in the suit in this court. The taking of proofs for final hearing in the South Carolina suit had been

closed. The defendants in the suit in this court then applied to this court, in the suit in this court, for an injunction restraining the plaintiff from further prosecuting the said other three suits, and from commencing other suits against purchasers from them, alleging that they had been called on to account, in the suit in this court, for the making and selling of the articles covered by the said other three suits. *Held*, that this court had no power, in the suit in this court, to regulate the conduct of the plaintiff by injunction or stay or repression, except as regarded proceedings in this suit, and that the New Jersey suit might properly have been brought even in this court, and that, as to the New Jersey and South Carolina suits, the application, to be entertained at all, should have been made before the plaintiff took proofs for final hearing. *Rumford Chemical Works v. Hecker*, 11 Blatchf. 552.

43. (Sept., 1874.) W., trustee of a bankrupt, filed a bill in equity, setting forth that P., the bankrupt, had owned a vessel, and had made a preferential transfer of an undivided half of it to S., who had transferred it to G., and he to T., each transferee having knowledge of the fraudulent character of the original transfer. The bill set forth that, if T. had any interest in the vessel, there was no irreconcilable difference between the plaintiff and T. in regard to the management, disposition, and navigation of the vessel, and that T. had forcibly seized the vessel from the possession of the plaintiff. The prayer of the bill was, that the transfers be adjudged void, and for temporary injunction and receiver, and, if T. should be adjudged a part owner, for an accounting, and a sale of the vessel, and a distribution of the proceeds. The plaintiff moved for an injunction and a receiver. P., S., G., and T. were defendants in the bill, and denied all fraud. *Held*, that the motion must be denied. *Wilkinson v. Dobbie*, 12 Blatchf. 298.

44. The bill should aver joint ownership in the plaintiff and T., to warrant preliminary relief. *Ib.*

45. If it did aver such joint ownership, it would be multifarious, as asking, also, to set aside the transfers as fraudulent. *Ib.*

46. (Oct., 1878.) A motion for a preliminary injunction to restrain the infringement of a patent was made six months after the patent was issued. The answer put in issue its validity, and set up a license to construct and use the machine complained of,

granted by the plaintiff before the patent was issued. It was disputed, on affidavits, whether the defendant's machine was so made with the knowledge and consent of the plaintiff, and whether the invention was new, and the defendant was shown to be able to respond in damages. *Held*, that the motion must be denied. *McGuire v. Eames*, 15 Blatchf. 312.

47. (Feb., 1879.) A composition in bankruptcy, by T., in the District Court of the United States for the Eastern District of New York, was perfected, he having petitioned in voluntary bankruptcy. After such petition was filed, I., a creditor of T., brought a suit against him, in a state court in the city of New York, in the Southern District of New York, to recover a debt, and levied an attachment on property of T. After that T. was adjudged a bankrupt. I. obtained judgment, and issued an execution, and the sheriff was about to sell the attached property. I. was bound by the composition. T. then brought a suit in equity in the Circuit Court of the United States for the Southern District of New York, against I. and the sheriff, to restrain them, and to have the levy declared void and the property restored to T., and applied for an injunction *pendente lite*. *Held*, that said Circuit Court had no jurisdiction to grant the injunction, being forbidden to do so by sec. 720 of the Revised Statutes of the United States. *Tift v. The Iron Clad Mfg. Co.*, 16 Blatchf. 48.

48. Although the suit be one arising under the laws of the United States, within sec. 1 of the act of March 3, 1875 (18 Stat. at Large, 470), yet the injunction asked is not authorized by the bankrupt law to be issued by the Circuit Court, and so within the exception in sec. 720 of the Revised Statutes. *Ib.*

49. (Dec., 1879.) An injunction will not be granted to restrain a defendant from proceeding in the state court in a cause which the plaintiff claims has been removed into this court, although the jurisdiction of this court over the cause is clear, and the state court has refused to make an order for the removal of the cause, and the defendant has noticed the cause for trial in the state court. *Blackman v. Hibbler*, 17 Blatchf. 332.

50. Such injunction is not required to uphold the jurisdiction of this court over the cause. *Ib.*

51. (Oct., 1855.) Chancery will not interfere by injunction in questions of trade-mark, between the vendors of patent medi-

cines, being quack medicines; such questions having too little merit to commend them on either side. *Heath v. Wright*, 3 Wall. Jr. 141.

52. (Nov., 1860.) Wherever a defendant in equity—not alleged to be insolvent or likely to become so—presents, by answer or otherwise, a case which shows a *bona fide* issue in fact or law, or a *prima facie* right to continue his manufacture, founded on a decree of the patent-office and a consequent public grant, the court will give a preliminary injunction, even in favor of a prior patentee holding a patent for the same general purpose, only when there is a clear mistake of some sort. This kind of process being, in fact, an execution before judgment, is to be used cautiously. *Goodyear v. Dunbar*, 3 Wall. Jr. 310.

53. However, if there is doubt in the case, as there naturally is when the two patents are for the same general purpose, the court will commonly direct the defendant to keep an account. *Ib.*

54. (Jan., 1877.) Where a suit upon a patent is pending against the defendant, who is manufacturing and vending an article claimed to be an infringement of the patent, and it appears to the court that the defendant is responsible for such profits and damages as may be assessed against him as the result of the suit, the court may, in its discretion, enjoin the complainant from bringing suit against the vendees of defendant. This is true, although the complainant enjoined may not be within the district at the time of the injunction; as, by reason of bringing the suit, he has given the court jurisdiction over him for such purposes as may be necessary to do full equity between the parties, in relation to the subject-matter of the suit. *Birdsell v. Mfg. Co.*, 1 Hughes, 64.

55. (April, 1878.) Though it is true that courts of equity of the United States cannot enjoin an officer of the United States from collecting a tax, yet there are circumstances under which such collecting officers may be enjoined from claiming moneys of citizens, and levying for them as if for taxes. *Frayser v. Russell*, 3 Hughes, 227.

56. (Nov., 1871.) A federal court cannot interfere by injunction to restrain a sale of the property of A., on an execution issued out of a state court, against the property of B. *Daly v. The Sheriff*, 1 Woods, 175.

57. (May, 1875.) A state indorsed the bonds of a railroad company, upon the express condition that such indorsement should vest in the state the title of all property purchased with the proceeds of said bonds, and should give the state a first lien on all property of the company; and that, upon failure of the company to pay the interest or principal of the bonds, the governor should take possession of all its property and sell the same, for the purpose of paying said bonds. Default was made by the railroad company in the payment of interest, and the governor took possession of its property, which he advertised for sale. *Held*, that at the suit of a holder of bonds of a subsequent issue, which the state had indorsed on the same terms as the first issue, but which indorsement the legislature had declared not binding on the state, the court would not restrain the sale of the road by the governor, nor take the possession thereof from the state, nor appoint a receiver therefor. *Branch v. Railroad Co.*, 2 Woods, 385.

58. The relief asked in such a case could not be granted without adjudicating the rights of the state, which ought not to be done unless the state were a party, and the state could not be made a party. *Id.*

59. (July, 1873.) Where a first mortgage has been foreclosed, and a decree of sale made and execution issued accordingly, a second mortgagee, not made a party to the suit, cannot have an injunction to restrain the sale, as his rights are unaffected. *Searles v. Railroad Co.*, 2 Woods, 621.

60. An injunction to prevent a sale under execution will not be granted to a person who was not a party to the decree, unless he can show that his rights will be directly affected by the sale. Thus, where property has been sold under a first mortgage, by a statutory proceeding, and the purchasers fail to pay the price of sale, although they have obtained a deed for, and possession of, the property, and a bill is filed on the vendor's lien to compel payment of the balance, and a decree is obtained to that effect, and execution issued, a second mortgagee cannot have an injunction to prevent the sale, his rights being extinguished by the statutory sale. *Id.*

61. (April, 1879.) Sec. 720, Revised Statutes, which declares that "the writ of injunction shall not be granted by any court of the United States, to stay proceedings in any court of a state," has application only to such proceedings as had been commenced

before the jurisdiction of the federal court attached. *State Lottery Co. v. Fitzpatrick*, 3 Woods, 223.

62. (March, 1874.) If a case has been removed from a state to the federal court, and an objection be raised to the jurisdiction of the latter court, the federal court will protect the rights of all parties during the interval and prior to the decision of that question; and, if land be the subject of the controversy, will, if necessary, award an injunction restraining waste. *Warren v. Ives*, 1 Flipp. 356.

63. (July, 1846.) Before granting an injunction on a charge of an infringement of copyright, the court will, generally, refer the matter to a master, with instructions to report the extent of the infringement, if any, that the court may act on the case. *Story v. Derby*, 4 McLean, 160.

64. (April, 1852.) The courts of the United States cannot enjoin a suit in a state court. *Rogers v. City of Cincinnati*, 5 McLean, 337.

65. But if this could be done, an injunction could not be issued where there is an adequate remedy at law. *Ib.*

66. (Sept., 1875.) The Wisconsin statute of March 14, 1870, that no non-resident corporation should remove a suit from the state to the federal courts, having been declared unconstitutional by the Supreme Court of the United States, the provision of the statute of April 5, 1872, requiring the Secretary of State to revoke the license of any such corporation applying for such removal, falls with it. *Hartford Fire Ins. Co. v. Doyle*, 6 Biss. 461.

67. The United States Circuit Court can in such case grant an injunction restraining the Secretary of State from attempting to forfeit the license. *Ib.*

68. (1873.) The Circuit Court of the United States may, in a proper case, enjoin the agents or officers of a state, whatever may be their grade, and this although the state may be the real party in interest. This doctrine applied in this case against the Governor of Missouri, acting as the special agent of the state in the foreclosure of a mortgage lien for the benefit of the state. *Murdock v. Woodson*, 2 Dill. 188.

69. (Jan., 1858.) Where proper averments are made in the bill to give jurisdiction, they give *prima facie* jurisdiction to the court, and enable it to do justice between the parties, in cases of irremediable mischief, by the issue of a temporary injunction,

until the plea to the jurisdiction has been disposed of. *Fremont v. Merced Mining Co.*, McAll. 267.

Injunction or Mandamus.

1. (Dec., 1869.) The rule established in *Gaines v. Thompson* (7 Wall. 347), that the courts will not interfere by *mandamus* or *injunction*, with the exercise by the executive officers of duties requiring judgment or discretion, affirmed and applied to registers and receivers of land-offices. *Litchfield v. The Register and Receiver*, 9 Wall. 575.

2. The fact that a plaintiff asserts himself to be the owner of the tract of land which these officers are treating as public lands does not take the case out of that rule, where it is the duty of these officers to determine upon all the facts before them, whether the land is open to pre-emption or sale. *Ib.*

3. In such cases, if the court could entertain jurisdiction against the land-offices, the persons asserting the right of pre-emption would be necessary parties to the suit. *Ib.*

4. (Oct., 1875.) Although a state, without its consent, cannot be sued by an individual, nor can a court substitute its own discretion for that of executive officers, in matters belonging to their proper jurisdiction, yet when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an *injunction* to prevent it. In such cases, the writs of *mandamus* and *injunction* are somewhat correlative to each other. In either case, if the official plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void. *Board of Liquidation et al. v. McComb*, 2 Otto, 531.

5. (Oct., 1879.) An injunction or a *mandamus* will not lie against an officer of the Land Department, to control him in discharging an official duty which requires the exercise of his judgment and discretion. *Marquez v. Frisbie*, 11 Otto, 473.

Injunction. Motion to dissolve.

1. (Oct., 1796.) PETERS, Justice. If this were not a case in which an irreparable injury might be done, by allowing the stock to be placed beyond the jurisdiction of the court, it would, perhaps, be proper to insist upon a more rigid practice than has been pursued. But the dissolution of the injunction would probably put the property out of the power of the court, and incapacitate us from doing justice hereafter to the parties, according to the real merits of their respective pretensions.

It is proper, however, to observe that I do not think an affidavit to the contents of a bill is the only foundation for issuing an injunction. . . . Reason and the dictates of justice require that other proof besides the party's oath should be allowed. Nor, under all the circumstances, can I decide that the delay which has occurred is without a reasonable excuse.

WILSON, Justice, substantially concurred. *Schermehorn v. L'Esperasse*, 2 Dall. 360, 363, 364.

2. (Oct., 1837.) In common cases it is of course to dissolve an injunction, if the answer denies the whole merits; and the plaintiff will not be permitted, upon a motion to dissolve the injunction, to read affidavits in contradiction to the answer. It is otherwise in cases of special injunctions. *Poor v. Carleton*, 3 Sumn. 70.

3. The answer must positively deny the material facts of the bill, and the denial must be grounded on personal knowledge, not merely on information and belief, in order to support an application to dissolve a special injunction. *Ib.*

4. In cases of irreparable mischief, the dissolution of an injunction rests in the sound discretion of the court, whether applied for before or after answer. *Ib.*

5. Affidavits may, after answer, be read by the plaintiff to support the injunction, as well as by the defendant to repel it; and this, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer. *Semble*, the practice on this subject is more liberal in America than in England. *Ib.*

6. (April, 1874.) In a suit in equity for the infringement of letters-patent, the answer did not state the name or residence of any person alleged to have had prior knowledge of the patented

invention, or set up a defense of the abandonment of the invention to the public by the inventor, although it averred generally prior knowledge and use of the invention. The plaintiff took proofs for final hearing, and rested his case. The defendant took no proofs. The court then granted a preliminary injunction in the suit, restraining the infringement of one of the claims of the patent. Afterwards, and after the time for taking proofs had expired, the defendant, without having obtained leave to amend his answer, or an extension of the time for taking proofs, applied to the court to dissolve the injunction, on affidavits setting out matters intended to show that the invention covered by said first claim was, with the consent and allowance of the inventor, in public use, at a place named, for more than two years before the patent was applied for, and that the invention was previously known by persons named. *Held*, that, inasmuch as such defenses could not be availed of by the defendant in the taking of proofs for final hearing, they could not be availed of to dissolve the injunction. *Union Paper-Bag Machine Co. v. Newell*, 11 Blatchf. 549.

7. (Aug., 1879.) Where a defendant, in opposing a motion for a preliminary injunction to restrain the infringement of a patent, which was granted, and in afterwards opposing a motion to punish him for a contempt in violating such injunction by making and selling a certain form of school-desk, neglected to present to the court alleged facts as to his own manufacture and sale of such form of school-desk at a date early enough to anticipate the patent, it was *held* that he ought not to be afterwards allowed to present such alleged facts, on a motion to dissolve such injunction. *National School Furniture Co. v. Paton*, 16 Blatchf. 563.

8. (Oct., 1821.) A bill for an injunction to stay proceedings in a suit at law, accompanied with the usual affidavit, was filed in 1816 against the defendant, a Hong merchant of Canton. The court ordered that the service of the subpœna on the defendant's attorney in the action at law should be deemed sufficient, and the injunction was granted. After five years, a motion was made to dissolve the injunction absolutely, without an answer. *Held*, that the motion was unprecedented. If the injunction be granted until further answer and further order, which is the usual form, it is never dissolved until the answer comes in, even although

the defendant should live abroad. *Read v. Consequa*, 4 Wash. 174.

9. (April, 1872.) Where a preliminary injunction has been issued by consent, a motion to dissolve must be considered solely upon the questions raised by the answer. *Farmer v. Calvert Lithographing, &c. Co.*, 1 Flipp. 228.

10. On motion to dissolve, the complainant cannot read affidavits in rebuttal, in support of his title. He must depend upon the affidavits filed with his bill. *Ib.*

11. Denials or allegations upon information and belief are not sufficient to dissolve an injunction. *Ib.*

Rule 56. — Bills of Revivor.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties, entitled to revive the same; which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpœna shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

1. (Feb., 1822.) In real actions, the death of the ancestor, without having appeared to the suit, abates the suit, and it cannot be revived and prosecuted against the heirs of the original defendant. *Macker v. Thomas*, 7 Wheat. 530.

2. (Jan., 1828.) After an answer and discovery the rule is, that a suit brought merely for discovery cannot be revived. The object is obtained, and the plaintiff has no motive for reviving it. *Horsburg v. Baker*, 1 Pet. 232.

3. (Jan., 1838.) A bill of revivor is not the commencement of a new suit, but is the mere continuance of the old suit. It is upon ground somewhat analogous that the Circuit Courts are held to have jurisdiction in cases of cross-bills and injunction bills, touching suits and judgments already in those courts. *Clarke v. Mathewson*, 12 Pet. 164.

4. (Jan., 1839.) After a decree of foreclosure of a mortgage and a sale, and the death of the defendant takes place after the decree, it is not necessary to revive the proceedings against the heirs of the deceased party before a sale of the property can be made. *Whiting v. Bank of United States*, 13 Pet. 6.

5. (Oct., 1858.) The thirty-first section of the act of Congress of the 24th of September, 1789, confers no jurisdiction upon this court of a bill of revivor against the administrator with the will annexed of the deceased respondent in the original suit, said administrator having been appointed by a Probate Court in California. *Mellus v. Thompson*, 1 Cliff. 125.

6. *Clark v. Mathewson* (12 Pet. 170) reviewed, and construed not to assert a doctrine contrary to this. *Ib.*

Rule 57. — Supplemental Bill. Demurrer, Plea, or Answer thereto.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

1. (Dec., 1851.) After a case had been argued and was under advisement, a motion to permit the complainant to file a further bill by way of supplement and amendment, which would have been an essential change in the character and objects of the cause, was properly overruled in the Circuit Court. *Snead v. M' Coull*, 12 How. 407.

2. (June, 1832.) Where there is a transfer of interest *pendente lite*, a supplemental bill may be filed by or against the purchasers. *Hoxie v. Carr*, 1 Sumn. 173.

3. (May, 1845.) After an interlocutory decree, a supplemental bill to admit new evidence is never granted, where the party might, by due diligence, have introduced such evidence originally in the cause, or where he had full means of knowledge within his reach. *Jenkins v. Eldredge*, 3 Story, 300.

4. (Jan., 1848.) Under Rule 57 in equity, requiring notice to be given on an application for leave to file a supplemental bill, it is not necessary that the petition for leave should embrace the averments intended to be inserted in the supplemental bill, but only that it should advise the opposite party and the court of the ground on which the relief is applied for. *Parkhurst v. Kinsman*, 2 Blatchf. 72.

5. All that the court inquires into, on such a petition, is to see whether probable cause exists for granting the leave, and whether the petition states facts or circumstances which, if properly pleaded, would sustain a supplemental bill. *Ib.*

6. Where the original bill was against K., and was founded mainly on an agreement between the plaintiff and K., in relation to a machine patented to the former, which gave to K. the right to make and vend the machines on certain conditions, and on filing the bill an injunction was issued against K., prohibiting his further making or selling the machines, — *Held*, that a petition alleging that since the filing of the bill, G. had, *as the plaintiff was informed and believed*, become in some way interested in the machines, and was, *as the plaintiff believed*, acting in collusion with K. in making and vending them, and represented himself as so interested, was sufficient to authorize the plaintiff to make G. a party to the same suit by supplemental bill. *Ib.*

7. Where the same petition asked leave to insert in a supplemental bill new matters in regard to K., — *Held*, that although most of them would be proper subjects of amendment to the original bill, and could not lay the foundation for a supplemental bill, yet, as a discovery was sought from K. in regard to particulars not stated in the original bill, and K. had already answered that bill, the leave ought to be granted. *Ib.*

8. Circumstances stated under which laches will not be imputed to the plaintiff as a ground for denying him leave to file a supplemental bill. *Ib.*

9. (Oct., 1870.) As to the S. Co., the amended and supplemental bill [making the S. Co. a party and alleging new matter against it] is an original bill. *Myers v. Dorr*, 13 Blatchf. 23.

10. (Dec., 1875.) After a bill in equity had been filed for the infringement of a patent for an invention, the patent was surrendered, and a reissued patent was granted. The plaintiff then moved for leave to file a supplemental bill founded on the reissued

patent and for an injunction. *Held*, that the motions must be denied, on the ground that by the surrender and reissue the suit was at an end, and that the plaintiff must proceed by original bill founded on the reissued patent. *Fry v. Quinlan*, 13 Blatchf. 205.

11. (June, 1861.) In chancery, no material fact which has accrued since filing the original bill can be introduced in an amended bill, and a party can only avail himself of such fact by filing a supplemental bill. *Copen v. Flesher*, 1 Bond, 440.

12. (Oct., 1861.) Where a receiver has proceeded, under a decree in favor of complainants, to reduce into his possession the property or assets of the defendants, the complainants cannot call on the defendants for a disclosure, by means of a supplemental bill. *Dunham & St. John v. Railroad Co.*, 1 Bond, 493.

13. (July, 1863.) Where a complainant has assigned his interest in the subject-matter of the litigation pending the suit, his assignee cannot, on a supplemental bill, be substituted in his rights. He must file an original bill in the nature of a supplemental bill. *Tappan v. Smith*, 5 Biss. 73.

Rule 58. — Statements in Bill of Revivor, or Supplemental Bill.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

Rule 59. — Answers, before whom may be sworn to.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any Circuit Court to take testimony or depositions, or before any master in chancery appointed by any Circuit Court, or before any judge of any court of a state or territory.

1. (April, 1813.) Under special circumstances, as if the defendant in a bill for an injunction be merely nominal, the court will, on the application of the party really interested, though not a party on the record, direct the answer of the nominal party to be taken under a commission; and notice of such an application is not necessary. *Wilkins v. Jordan*, 3 Wash. 226.

2. (Oct., 1822.) An answer in chancery by a defendant beyond

sea must be taken and sworn to by a commission under a *dedimus* issued by this court, directing him to administer the oath in the most solemn forms observed by the laws and usages of that country. *Read v. Consequa*, 4 Wash. 335.

Rule 60. — Amendment of Answers.

After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

Answer. Amended and Supplemental.

1. (Dec., 1857.) No objection can be made to the Circuit Court allowing a supplemental answer to be filed when the mandate went down. It was like a petition to bring before the court the facts, which were proper to be known before instructions were given to the master, as to the mode of settling the accounts. *Williams v. Gibbes*, 20 How. 535.

2. (Oct., 1877.) Where, after setting up the defense of prior knowledge and use of the thing patented, and giving the names and residences of witnesses intended to be called to prove the defense, the answer to a bill for the infringement of letters-patent alleges that the names and residences of certain other witnesses are unknown to the defendant, and prays leave to insert and set forth in the answer such names and residences when they shall be discovered, it is competent for the court to allow, upon such discovery, the amendment to be made *nunc pro tunc*. *Roemer v. Simon*, 5 Otto, 214.

3. (May, 1839.) In matters of form, or mistakes of dates, or

verbal inaccuracies, courts of equity are very indulgent in allowing amendments to answers. *Smith v. Babcock*, 3 Sumn. 583.

4. But they are slow to allow amendments in material facts, or to change essentially the grounds taken in the original answer. *Ib.*

5. Where the object is to let in new facts and defenses, wholly dependent upon parol evidence, the reluctance of the court to allow amendments is greatly increased, since it would encourage carelessness and indifference in making answers, and open the door to the introduction of testimony manufactured for the occasion. *Ib.*

6. But where the facts sought to be introduced are written papers or documents, which have been omitted by accident or mistake, there the common reason does not apply in its full force; for such papers and documents cannot be made to speak a different language from that which originally belonged to them. *Ib.*

7. The whole matter is in the discretion of the court; but, before the amendments to the answer are allowed, the court should be satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected or the facts to be added are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was put in and sworn to. *Ib.*

8. (March, 1873.) In a suit in equity to restrain infringement of letters-patent, evidence to show want of novelty in the patented invention, which is not admissible for want of proper notice of such defense in the answer, is not made admissible by a subsequent amendment of the answer setting up the defense in due form. *Roberts v. Buck*, 1 Holmes, 224.

9. (June, 1850.) *Held*, that the defendants were entitled to amend their answer, on payment of costs, by inserting newly discovered matter. *Foote v. Silsby*, 1 Blatchf. 545.

10. (April, 1869.) In this case the defendant was allowed to move to amend his answer, without costs, after the hearing, and before the decree, so as to set up the particulars of defense on the ground of the want of novelty disclosed in the proofs. [Proofs of the want of novelty in the patented article had been taken

without objection, although the defendant's answer did not properly lay the foundation for such proofs.] *Brown v. Hall*, 6 Blatchf. 401.

11. (Dec., 1870.) It is a proper construction of the sixtieth rule of the Rules in Equity prescribed by the Supreme Court, that good cause for allowing an amendment of an answer, so as to set up a new defense, ought not to be regarded as being shown, where it appears that the matter of the proposed amendment could, with reasonable diligence, have been sooner introduced into the answer. *India Rubber Comb Co. v. Phelps*, 8 Blatchf. 85.

12. In this case a motion to amend an answer, by setting up a new defense in a suit in equity for the infringement of letters-patent, after an interlocutory decree in favor of the plaintiff, awarding an account and a perpetual injunction, had been made, and the accounting had been proceeded with, was denied, the new defense being one dependent wholly on parol evidence, and it not being shown that information of the matter of such new defense could not, with reasonable diligence, have been obtained prior to the making of such decree. *Id.*

13. (March, 1874.) The defendants, when sued in equity for infringing letters-patent for a stove, admitted, in their answer, the infringement charged, and set forth the number of infringing stoves they had made and sold, and rested their defense on their claim of ownership of the patent. The plaintiff had a decree. A motion by the defendants for a rehearing was denied, and an accounting in regard to profits was had, in which the defendants were charged with the profits on the said number of stoves, and the report of the master was made. The defendants then, upon allegations of mistake and error in such admission, moved for leave to amend their answer, and open the case, so as to contest the question of infringement, or at least the extent thereof, before the master. *Held*, that the motion must be denied. *Ruggles v. Eddy*, 11 Blatchf. 524.

14. (May, 1876.) In a suit in equity on a patent, the defendant, more than one year after the plaintiff's proofs were closed, moved to amend the sworn answer by averring, on information and belief, that the patented invention was in public use for more than two years before the patent was applied for, and that it was described in a prior patent granted by the United States. The only excuse offered for not inserting the first defense in the orig-

inal answer was that the counsel who prepared such answer was under the impression that the suit was subject to the law as it stood prior to the Patent Act of July 8, 1870. As to the second defense, the excuse was that such counsel had no knowledge or information of any description in any patent prior to the plaintiff's of a certain device. *Held*, that the motion must be denied. *Webster Loom Co. v. Higgins*, 13 Blatchf. 349.

15. (Nov., 1878.) In a suit on a patent in this court by P. against B., a final decree was made by consent, adjudging the patent to be valid, and awarding \$2,000 for infringement. B. had also, by an agreement in writing, acknowledged the validity of the patent and the novelty and utility of the invention. In a subsequent suit by P. against B. in this court for infringement of the same patent, B., after answer, moved to amend the answer by denying the novelty and utility of the invention. *Held*, that the motion must be denied. *Pentlarge v. Beeston*, 15 Blatchf. 347.

16. (April, 1831.) Where a defendant had answered generally to a matter of which he had no particular knowledge, he was allowed to file a supplemental answer on the same subject, after he had acquired particular information concerning it. He may introduce into such answer new matter which has come to his knowledge since filing the original answer, on furnishing the opposite party with the names of the witnesses by whom he expects to prove it. *Caster v. Wood*, Baldw. 289.

17. Applications to amend an answer are in the discretion of the court. *Ib.*

18. (Nov., 1860.) In a bill for infringing a patent, the defendants were allowed, under special circumstances, and there being no laches, to strike out an admission in their answer, that they had made certain articles, their making of which the complainant was seeking by the bill to enjoin. *Morehead v. Jones*, 3 Wall. Jr. 306.

19. (May, 1807.) Motions to amend the pleadings in a cause, either at law or in equity, are always addressed to the sound discretion of the court; and this legal discretion seems to acknowledge no other limits than those which are required by the purposes of justice, and for the restraint of gross and inexcusable negligence. But a defendant in equity will not be permitted to amend his answer after the opinion of the court and the testimony have indicated in what respect it may be modified so as to effect his purpose. *Calloway v. Dobson*, 1 Brock. 119.

20. (June, 1855.) Leave to file a supplemental answer to a bill of foreclosure, based upon a fact which was known to the party at the time of the original answer, and which was not omitted through mistake, refused. *Suydam v. Truesdale*, 6 McLean, 459.

21. A supplemental answer must embrace new matter discovered after the putting in of the answer on file. *Id.*

22. It is an application to the discretion of the court, and will of course be denied, if it is apparent from the record that it was known to the party before his first answer. *Id.*

Rule 61. — Exceptions to Answers.

After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

Rule 62. — Separate Answers filed by same Solicitor. Costs.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

Rule 63. — Exceptions to Answer for Insufficiency. Setting down for Hearing.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may,

for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

1. (Oct., 1840.) Where an interrogatory pertinent to a charge in a bill in equity required the defendant to answer "as to his knowledge, remembrance, information, and belief, that the charge was not true," and an exception was filed by the plaintiffs, on the ground "that the answer did not state whether the defendant believed it to be true," it was *held* that the exception was well founded, and it was accordingly allowed. *Brooks v. Byam*, 1 Story, 296.

2. An exception to an answer for insufficiency should state the charges in the bill, the interrogatory applicable thereto, to which the answer is responsive, and the terms of the answer, *verbatim*, so that the court may see whether it is sufficient or not. *Ib.*

3. (May, 1845.) In the present case exceptions were taken by the plaintiff to the answer, on the ground that the statements of the defendants therein contained were not, "to the best of their knowledge, remembrance, information, and belief," as required by the bill, and were imperfect and insufficient, and the exceptions were allowed by the court. *Held*, that the defendant was bound to answer as to his information and remembrance and belief, as well as to his knowledge. *Kittredge v. Claremont Bank*, 3 Story, 590.

4. (May, 1801.) Complainant allowed to withdraw his exception to the defendant's answer, and to take at his peril a subpoena to rejoin, returnable forthwith. *Penn v. Butler*, Wall. C. C. 4.¹

5. (Oct., 1822.) An answer from China being objected to as not responsive to all the charges in the bill, the court directed the plaintiff to file his exceptions in ten days, and that, if the new answer was clear of those exceptions, no new exceptions to it would be listened to. *Read v. Consequa*, 4 Wash. 335.

6. (April, 1825.) It is good cause of exception to an answer, that to the denial that defendant has no knowledge of the facts charged it is not added "that he had no information or belief" of them. *Bradford v. Geiss*, 4 Wash. 513.

7. (Jan., 1871.) Under the sixty-third rule of equity practice,

¹ Second edition.

exceptions to an answer for insufficiency must be set down on a rule-day, for hearing before a judge of the court. A reference of such exceptions on a day not a rule-day, and to a master instead of a judge of the court, is, unless cured by some subsequent action of the court, a nullity, and is an abandonment of the exceptions. *La Vega v. Lapsley*, 1 Woods, 428.

**Rule 64. — Exceptions to Answer allowed. Further Answer.
Pro Confesso. Attachment.**

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

Rule 65. — Costs, on Exceptions to Answer.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

Rule 66. — Replication and Issue. Dismissal for Want of.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

1. (Feb., 1821.) A replication to a plea is an admission of the sufficiency of the plea, as much as if it had been set down for argument and allowed ; and all that the defendant has to do is to prove it in point of fact, and a dismissal of the bill on the hearing is then a matter of course. *Hughes v. Blake*, 6 Wheat. 453.

2. (Jan., 1833.) The bill set forth a title in B. H., the wife of T. H., by direct descent from her brother to herself, and insisted on this title to certain real estate. The answer of the defendants resisted the claim, because the land had been conveyed by the complainants, before the institution of the suit, to A. C. The complainant, in his replication, admitted the execution of the deed to A. C., but averred that it was made in trust, to reconvey the lot to T. H., to be held by him for the use and benefit of B. H., his wife, and her heirs, and to enable T. H. to manage and litigate the said rights ; and that A. H., in execution of the trust, made a deed to T. H. The deed was recorded, and was exhibited ; but it did not state the trust. The rules of the court of chancery will not permit this departure in the replication from the statements of the bill. *Vattier v. Hinde*, 7 Pet. 253.

3. (Oct., 1873.) A party cannot set up in his replication a claim not in any way made in his bill, and the granting of which he asks in his replication, only in the event that the case made in his bill fails. *Warren v. Van Brunt*, 19 Wall. 646.

4. (Dec., 1868.) Under Rule 66 of the rules in equity prescribed by the Supreme Court, the answer of every defendant in a suit in equity, when sufficient, must be replied to, without reference to the state of the cause or of the pleadings in regard to any other defendant. *Coleman v. Martin*, 6 Blatchf. 291.

5. (Oct., 1870.) Where a plaintiff in equity, instead of setting down the defendant's plea for argument, replies to it, he admits its sufficiency as a defense, if the facts it alleges shall be established. *Myers v. Dorr*, 13 Blatchf. 23.

6. (Nov., 1877.) A suit in equity was heard on a bill and answer, and the bill was dismissed. The plaintiff afterwards, before a final decree was entered, asked to be allowed to file a general replication and take testimony, offering to pay the accrued costs. No mistake or inadvertence was suggested. *Held*, that the motion must be denied. *Bullinger v. Mackey*, 14 Blatchf. 355.

7. (April, 1879.) Where a defendant in a suit in equity puts in proofs to sustain the allegations of his answer, and allows the

plaintiff to put in proofs in rebuttal, and proofs in contradiction of the allegations of the answer, without entering any objection on the record that there was no replication to the answer, he is estopped from raising such objection at the hearing. *Fischer v. Wilson*, 16 Blatchf. 220.

8. (Oct., 1816.) If the complainant in a bill in chancery does not file a general replication to the answer of the defendant, the answer is to be taken as true, and no evidence can be given by the complainant to contradict it. *Peirce v. West's Executors*, Pet. C. C. 351.

9. After a cause was set down for hearing on bill and answer, and a reference to the auditor, the plaintiff was allowed to file a general replication. *Ib.*

10. (April, 1808.) Where the replication denies all the allegations in the plea, the plea must be supported by evidence. *Gernon v. Boccaline*, 2 Wash. 199.

11. (April, 1821.) Special replications are disused in chancery. If the plaintiff finds it necessary, from the answer, to prove new matter, the practice is now to amend the bill. But if a special replication is filed, denying all the material parts of the answer, and also charging new matter, the new matter will be considered as surplusage at the hearing. *Duponti v. Mussy*, 4 Wash. 128.

12. (May, 1872.) When a cause in equity is submitted for final decree upon the pleadings and evidence, and it turns out that no replication has been filed to the answers, but that the evidence has been taken as if it had been filed, the court will try the case on its merits, notwithstanding the want of replication, or allow one to be filed instanter. *Jones v. Brittan*, 1 Woods, 667.

13. (Sept., 1874.) Under the sixty-sixth equity rule prescribed by the Supreme Court of the United States, the order dismissing the complainant's bill for want of a replication is of course, and may be entered in the clerk's office without any application to or action by the judge. *Robinson v. Satterlee*, 3 Sawyer, 134.

14. The dismissal is final, unless set aside by the court, upon application duly made within the proper time, in pursuance of the provisions of the rule. *Ib.*

15. Where a bill has been dismissed for want of a replication, under the sixty-sixth equity rule, a motion to set aside the dis-

missal, made nearly five years after the entry of the order of dismissal, without offering any excuse for the delay, will be denied. *Ib.*

Rule 67.—Testimony. How Taken.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases, the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

DECEMBER TERM, 1854.

Ordered, That the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule.

DECEMBER TERM, 1861.

Ordered, That the last paragraph in the sixty-seventh rule in equity be repealed, and the rule be amended as follows: Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties, or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examinations shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances; and, when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or

such of them as may attend ; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same ; and the examiner may, upon all examinations, state any special matters to the court as he shall think fit ; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions ; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

The Compulsory Attendance of Witnesses.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors, to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in the thirtieth section of act of Congress, Sept. 24, 1789.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

DECEMBER TERM, 1869.

Amendment to Sixty-seventh Rule.

Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December term, 1861, amending the sixty-seventh General Rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply ; and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained, on motion, for cause shown.

1. (Jan., 1847.) The statute of Louisiana requiring their courts to have the testimony taken down in all cases where an appeal lies to the Supreme Court, and the adoption of this rule by the court of the United States, includes only cases where an appeal (technically speaking) lies, and not cases which are carried to an appellate court by writ of error. *Phillips v. Preston*, 5 How. 278.

2. (Oct., 1875.) So much of the Judiciary Act of 1789 as relates to the oral examination of witnesses, in open court, in causes in equity, was not expressly repealed until the adoption of the Revised Statutes, s. 862, which provides that "the mode of proof in causes of equity and of admiralty and maritime jurisdiction, shall be according to the rules now or hereafter prescribed by the Supreme Court, except as herein specially provided." *Blease v. Garlington*, 2 Otto, 1.

3. While this court does not say that, even since the Revised Statutes, the Circuit Courts may not in their discretion, under the operation of existing rules, permit the examination of witnesses orally, in open court, upon the hearing of cases in equity, it does say that they are not now by law required to do so; and that, if such practice is adopted in any case, the testimony presented in that form must be taken down, or its substance stated in writing and made part of the record, or it will be entirely disregarded here on an appeal. *Ib.*

4. (May, 1840.) In cases of disagreement between parties in regard to interrogatories and cross-interrogatories [for taking testimony of witnesses under a commission], they should be referred to a master in chancery, to be settled by him, subject to the ultimate review of the court upon an appeal from such report. *Cocker v. Franklin Hemp & Bagging Co.*, 1 Story, 169.

5. Exceptions to interrogatories or cross-interrogatories should be propounded as objections before the commission issues, or they will be deemed waived. *Ib.*

6. (April, 1813.) The court, having full power to issue commissions to take testimony abroad, when sitting as a court of common law, will not entertain any proceedings for such a purpose on its equity side. *Peters v. Prevost*, 1 Paine, 64.

7. (April, 1848.) The principles which govern the practice of the United States courts in equity considered. *Van Hook v. Pendleton*, 2 Blatchf. 85.

8. The practice as to examining witnesses in suits in equity considered. *Ib.*

9. The Circuit Courts of the United States have power to appoint examiners in suits in equity. *Ib.*

10. It is a matter of discretion whether such examiners shall be standing examiners, or be designated as the occasion arises for their services in any cause. *Ib.*

11. Where the plaintiff in a suit in equity proceeded, after the cause was at issue, to take proofs before one of the standing examiners of the court, without his having been specially appointed as examiner or commissioner in the suit, — *Held*, that the examiner was competent to take the evidence. *Ib.*

12. An oral examination before an examiner, without any agreement between the parties to waive written interrogatories, is irregular. *Ib.*

13. Such agreement ought to be in writing. *Ib.*

14. But where a party has due notice that such an oral examination is to be taken, or has been taken, and acquiesces in it, he waives his right to require written interrogatories. *Ib.*

15. Where, more than ten months after such an oral examination, and nearly five months after publication, the defendant, who had due notice of the time and place of examination, moved to set the proofs aside, because they were not taken on written interrogatories, — *Held*, that he was guilty of laches, and that it was too late for him to raise the objection. *Ib.*

16. Under Rule 78 of the rules in equity of 1842, it is a matter of discretion with the court whether it will or will not stay the proceedings in a cause to allow a party to cross-examine, or take a new deposition of a witness already examined by deposition, for the opposite party, under sec. 30 of the act of Sept. 24, 1789 (1 Stat. at Large, 88). *Ib.*

17. The practice in taking depositions under that act considered. *Ib.*

18. (Feb., 1854.) Under Rule 107 of this court, in equity, and the amendatory rule of this court, of May, 1846 (1 Blatchf. C. C. R. 656), the court, or a judge out of court, has power to permit the plaintiff, on such a motion [for a provisional injunction], where the defendant sets up a license in defense, to put in proofs in rebuttal of the proofs put in by the defendant. *Day v. New England Car-Spring Co.*, 3 Blatchf. 154.

19. The order to admit such rebutting proofs, when made by the court, is regular, although not made till such rebutting proofs are received. *Ib.*

20. But the defendant cannot reply to such rebutting proofs, by further proofs on his part. *Ib.*

21. (Dec., 1868.) The practice as to enlarging the time for the plaintiff to take proofs [where the cause is not at issue as to all the defendants], stated. *Coleman v. Martin*, 6 Blatchf. 291.

22. (Jan., 1872.). The testimony, in a suit in equity, may be taken orally, in open court. *In re Clark*, 9 Blatchf. 372.

23. (May, 1872.) On an application, after a hearing in a patent suit, to put in alleged newly discovered evidence, it must be shown that the party could not, with reasonable diligence, have obtained such evidence prior to such hearing. *Hitchcock v. Tremaine*, 9 Blatchf. 550.

24. (June, 1873.) Under secs. 61 and 76 of the act of July 8, 1870 (16 Stat. at Large, 208, 210), in a suit in equity for the infringement of a patent for a design, testimony as to the prior knowledge and use of the patented design by persons not named in the answer is incompetent. *Collender v. Griffith*, 11 Blatchf. 212.

25. (May, 1876.) B. brought a suit in equity in this court against C. and others, and in it took the deposition of I., as a witness. B. then discontinued the suit, and afterwards brought another suit in equity against the same defendants, in this court, for the same cause of action. No proofs were taken in it by either party, and, after it had been set down for hearing, by the consent of both parties, the defendants applied for an order to permit them to read, as testimony, the deposition of I., so taken in the former suit. It was not shown that I. was dead, or that there was anything to prevent his being examined in the usual way. *Held*, that the application must be refused. *Brewer v. Caldwell*, 13 Blatchf. 361.

26. (April, 1856.) Under the practice of the courts of the United States, as fixed by the Judiciary Act of 1789, a party may examine or cross-examine witnesses *ore tenus*, in equity suits, as well as in suits at common law; the power given him in this respect by the thirtieth section of that act not being taken away from him by any subsequent act, nor by the sixty-seventh rule of practice for the courts of equity promulgated on the 2d of

March, 1842, nor in any other manner. *Sickles v. The Gloucester Co.*, 3 Wall. Jr. 186.

27. (May, 1821.) The commissioner, in proceeding to act *ex parte*, on the defendant's failing to appear, adopted a course of very doubtful propriety. At all events, the defendant would, on motion, be allowed to repair his fault, especially if his non-attendance could be excused. *Coates's Executrix v. Muse's Adm'r*, 1 Brock. 530.

28. (April, 1871.) A motion to suppress depositions fairly brings up the regularity of an order directing them to be taken, as well as the competency of the witnesses examined, if the party moving to suppress has never waived the objection. *Eslava v. Mazange's Adm'r*, 1 Woods, 624.

29. (May, 1879.) Depositions of Dutch bondholders, complainants, in a suit in equity, were taken in Holland. Before the depositions were actually taken by the examiner, their counsel had read to them the interrogatories, and had prepared their answers in the English language. *Held*, (1) that the fact that the witnesses had heard the interrogatories in advance was not a ground for suppressing the depositions; and (2) that examination of witnesses should be made by the examiner, and not by counsel, in advance, and because this was not done in this case the depositions should be suppressed. *Railroad Co. v. Drew*, 3 Woods, 692.

30. Equity Rule 67 authorizes the court to appoint examiners for the taking of depositions orally, outside as well as inside its territorial jurisdiction. *Ib.*

31. (Dec., 1868.) [In chancery. Motion to suppress depositions for insufficiency of the notarial certificate.]

A motion to suppress depositions for irregularity comes too late when they have been on file for three years. *Bank of Danville v. Travers*, 4 Biss. 507.

32. (Jan., 1859.) A motion for the appointment of commissioners to take testimony abroad is not grantable of course. *United States v. Parrott*, McAll. 447.

33. The materiality of the testimony, and the purposes for which it is invoked, will determine the action of the court. *Ib.*

Rule 68. — Deposition.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

Rule 69. — Time for taking Testimony. Publication of Testimony.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

1. (Dec., 1869.) The three months allowed by the sixty-ninth of the rules in equity, for the taking of testimony, has reference to the taking of testimony by both parties, defendants as much as complainants. It is for the court below to decide whether further time shall be given or refused, and ordinarily the determination of the question would not be deemed a fit subject for review by this tribunal; though cases may occur of so flagrant a character that it would be its duty to interpose. *Ingle v. Jones*, 9 Wall. 486.

Rule 70. — Testimony de bene esse.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course,

upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

1. (April, 1871.) In such a case [under the statutes of the United States, in actions against executors, administrators, or guardians, which provide that "neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court"], the evidence of the party cannot be taken and admitted under the seventieth equity rule, on the ground that the witnesses are old and infirm. This rule was not originally intended for the examination of a party, and it is doubtful whether it ought ever to be extended to the case of a party propounding himself as a witness. *Eslava v. Mazange's Adm'r*, 1 Woods, 624.

Rule 71.—Form of the Last Interrogatory.

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

Rule 72.—Cross-Bill.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

1. (Feb., 1826.) Where a bill is filed to set aside an agreement or conveyance, the conveyance cannot be established with-

out a cross-bill, filed by the defendant. *Carnochan v. Christie*, 11 Wheat. 446.

2. (Dec., 1863.) A cross-bill, being an auxiliary bill simply, must be a bill touching matters in question in the original bill. If its purpose be different from that of the original bill, it is not a cross-bill, even although the matters presented in it have a connection with the same general subject. As an original bill, it will not attach to the controversy, unless it be filed under such circumstances of citizenship, &c., as give jurisdiction to original bills; herein differing from a cross-bill, which sometimes may so attach. *Cross v. De Valle*, 1 Wall. 1.

3. (Dec., 1864.) The filing of a cross-bill, on a petition, without the leave of the court, is an irregularity; and such cross-bill may be properly set aside. *Bronson v. La Crosse Railroad Co.*, 2 Wall. 283.

4. (Dec., 1869.) Where, on a bill by several persons for the infringement of a patent and for an account (the defenses being invalidity of the patent and a license), the court sustain the patent and decree damages, a bill cannot be regarded as a cross-bill which sets up a judgment in another suit against one of the complainants, and asks that the conjoined defendants in the principal suit set forth and discover what share of the damages they claim *respectively*, so that the defendant in that suit may set off his judgment as respects the one against whom it is. *Rubber Company v. Goodyear*, 9 Wall. 807.

5. As an original bill it cannot be sustained, if it have either been filed before the decree for damages was rendered in the principal suit, or have been a judgment in *attachment* only, and where there was no service on the person of the defendant. *Ib.*

6. (Oct., 1873.) Where a cross-bill and answers are filed in a case, and the decree undertakes to dispose of the whole case, it should dispose of the issues raised in them. *Moore v. Huntington*, 17 Wall. 417.

7. (Jan., 1872.) The bill in the first cause was an original bill. The bill in the second cause was a bill for discovery and relief, and denominated itself a cross-bill. The relief prayed in it was that certain releases and proceedings might be declared to be a bar to any further proceedings in the first cause, and that the bill in that cause might be dismissed, and that an injunction might issue restraining the prosecution of any suit involving the

questions covered by such release and proceedings. The discovery prayed was as to whether such proceedings did not take place, and as to whether the agent of the defendants in the second cause was not present when such proceedings took place. The releases were given, and the proceedings took place after issue was joined in the first cause. The defendants in the second cause being aliens, and out of the jurisdiction of the court, and being the plaintiffs in the first cause, the plaintiffs in the second cause, who were the defendants in the first cause, moved that the subpoena to appear and answer in the second cause be served on the solicitors for the plaintiffs in the first cause, and that the proceedings in the first cause be stayed until the cross-bill should be answered. In reply to the motion, such solicitors tendered a stipulation withdrawing their replications to the answers in the first cause, and permitting such answers to be amended by setting up therein the matters of the cross-bill not contained in such answers, or supplemental answers to be filed, setting up such matters. *Held*, that such stipulation made the cross-bill unnecessary, as to its prayer for relief, except so far as it prayed for an injunction; that, in that respect, it was an original bill; and that the substituted service asked for could not be made in an original suit. *Heath v. Erie Railway Co.*, 9 Blatchf. 316.

8. *Held*, also, that there was no allegation in the cross-bill that it was material that the plaintiffs should have the discovery asked; and that, if there were, the discovery was unnecessary, in view of the act of July 6, 1862, s. 1 (12 Stat. at Large, 588), and the act of July 2, 1864, s. 3 (13 id. 351), permitting parties to be witnesses. *Ib.*

9. The theory and basis of a bill of discovery in equity, in aid of a defense in another suit, is, that the court in which such other suit is pending has no means of compelling a discovery from the plaintiff therein, of facts material to the defense. *Ib.*

10. The motion was denied, but the benefit of the stipulation tendered was given to the defendants in the first cause. *Ib.*

11. If the defendants in that cause choose to examine the plaintiffs therein by commission, the court can require that the plaintiffs answer fully all interrogatories put to them, or else debar them from the benefit of their suit. *Ib.*

12. (Jan., 1878.) Where a person commences a suit in equity

in this court, and the defendant in such suit files a cross-bill against him in this court, he cannot set up, as a ground of demurrer to such cross-bill, that a state court had acquired prior jurisdiction, on a bill brought in that court, for the same relief, by the plaintiff in such cross-bill. *Brandon Mfg. Co. v. Prime*, 14 Blatchf. 371.

13. A cross-bill is properly filed to establish an equitable title to letters-patent, the legal title to which is in the plaintiff in the original bill filed for an infringement of such patent. *Ib.*

14. Where a cross-bill, brought for relief as well as defense, shows that persons not parties to the original bill are necessary parties to the cross-bill, they may properly be made such. *Ib.*

15. (April, 1825.) After the cause on the original bill was set for a hearing, the defendant was informed that the plaintiff was a nominal one, and that the real plaintiff was a citizen of the same state with the defendant. He immediately filed a cross-bill charging this, and asking a discovery. The original suit ought not to be heard until the cross-bill is answered. *Young v. Pott*, 4 Wash. 521.

16. (May, 1872.) Where a suit in equity was properly instituted against a railroad company by a stockholder, a bondholder, and the trustee for the bondholders named in the land-grant mortgages of the company, in behalf of themselves as well as all other stockholders, creditors, or bondholders who might desire and be entitled to intervene, and the bill charged that the officers, agents, and directors of the company were squandering and embezzling its property, and the purpose of the suit was that the assets of the company might be preserved and administered, and the relief prayed was proper to be granted, and a decree *pro confesso* had been regularly entered, a receiver properly appointed, an authentic report of the facts made to the court, and its judgment passed thereon, — individual stockholders were not permitted to intervene in the suit as defendants, and file a cross-bill on a general charge of fraud and collusion on the part of the receiver, and erroneous judgment on the part of the court in making the order referred to. *Forbes v. Railroad Co.*, 2 Woods, 323.

17. In such a suit, in which such proceedings have been taken, it is not the proper practice to allow individual stockholders to intervene to set aside the proceedings, or to interpose obstacles

to the progress of the suit. Such stockholders may come in to take the benefit of the proceedings and decree, but not to oppose and nullify them. *Ib.*

18. In such a suit, rival creditors, by proceedings before the master, may fix the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object and purpose of the suit, to obtain an administration of the company's assets and property. *Ib.*

19. In such a suit, persons will not be allowed to intervene as general defendants and contestants, unless they show that they have an interest in the results, as stockholders or otherwise, and are also able to show fraud and collusion between the plaintiffs in the suit and the officers of the company having charge of its interests. *Ib.*

20. (April, 1878.) A controversy between co-defendants to a bill in equity cannot be the matter of a cross-bill, unless its settlement is necessary to a complete decree upon the case made by the original bill. *Weaver v. Alter*, 3 Woods, 152.

21. (July, 1869.) In a suit in equity in this court, in which all the defendants are citizens of Indiana, one defendant cannot file a cross-bill against his co-defendants, proposing to litigate subjects foreign to the matters set up in the original bill, and in which the original complainants have no interest. *Putnam v. City of New Albany*, 4 Biss. 365.

22. (April, 1868.) A cross-bill will be sustained in the federal court, where a defendant is compelled to avail himself of that mode of defense, in order to protect himself from an injustice resulting to him from the position in which the cause stands, although the parties plaintiff and defendant, or some of them, are citizens of the same state; provided the defendants in such bill are already before the court, and are, as parties to the original bill, subject to its jurisdiction. *Schenck v. Peay & Bliss*, Woolw. 175.

23. S., a citizen of Ohio, filed his bill against P. and B., citizens of Arkansas. As against P., he asked that his title to the real estate, the subject of the suit, should be quieted; and as against B., who claimed an interest in the premises by a title the same as that of S., he sought partition. P. filed his cross-bill to have the title of both S. and B. declared void. *Held*, the

cross-bill is a proper mode of defense, necessary to a complete determination of the controversy brought before the court by the original bill. It is ancillary to the main cause, and brings no new parties before the court. It is not liable to objection by demurrer. *Ib.*

24. (1878.) The plaintiffs in the original bill in an equity suit have the right, as a matter of course, at any time before decree, to dismiss their bill at their own costs; but where a cross-bill has been filed by defendants and service of process was had thereunder on the plaintiffs, or the latter had voluntarily entered their appearance thereto, then the defendants would be entitled to a decree *pro confesso* on such cross-bill, on a dismissal of the original bill by the plaintiffs, after the lapse of the time allowed them by the rules to answer. *Lowenstein v. Glidewell*, 5 Dill. 325.

Rule 73. — Reference to and Proceedings before Masters.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

1. (Oct., 1847.) A master will be appointed, truly to take account of debts and credits; and where the court has means to do that satisfactorily, and is disposed to do it, the inquiry will not be referred to a master, unless both sides desire it, and acquiesce in the further delay and expense incident to it. *Jewett v. Cunard*, 3 Woodb. & M. 277.

2. (May, 1869.) [Copyright.] Where the two works are complex, as in this case, the case is referred to a master to state the facts, and his opinion as to the similarity of the same, for the consideration of the court. *Lawrence v. Dana*, 4 Cliff. 6.

3. Cases may arise where the court would not order the reference. *Ib.*

4. Equity suits for infringement of copyright are usually referred to a master, before final hearing, to ascertain whether the charge is proved; and, if so, for a report as to the nature and extent of the infringement. *Ib.*

5. (Oct., 1849.) On an injunction bill to restrain the infringement of a patent, where there is no dispute as to the title, the Circuit Courts of the United States have jurisdiction, under sec. 17 of the Patent Act of July 4, 1836 (5 Stat. at Large, 124), to refer the case to a master, to take an account of the profits of which the plaintiff has been deprived by reason of the infringement. *Allen v. Blunt*, 1 Blatchf. 480.

6. (Jan., 1877.) If a master's report, made under an interlocutory decree, discloses facts properly heard by him, which, in the opinion of the court, should be further investigated, it is competent for the court to direct such an investigation. *Magic Ruffle Co. v. Elm City Co.*, 14 Blatchf. 109.

7. (April, 1823.) A bill being for a balance of an account, taken *pro confesso*, the account must be referred to the master. The decree is always *nisi*. *Pendleton v. Evans's Executors*, 4 Wash. 391.

8. (April, 1876.) A court of chancery may refer a matter for inquiry as to the facts at any stage of the cause, even on final hearing. *In re Walshe*, 2 Woods, 225.

9. (May, 1872.) After a decree *pro confesso*, taken in a cause in equity, it is often proper for the court to inform itself, through its own officers, as by the report of a master, or by deposition, or other inquest or proceeding, more particularly as to the exact facts of the case. *Forbes v. Railroad Co.*, 2 Woods, 323.

10. (Oct., 1869.) The authority to refer to a master is inherent in a court of the United States, in the exercise of its chancery jurisdiction. *Thompson & Groom v. Smith*, 2 Bond, 320.

11. (May, 1880.) Consent will not authorize a master in chancery to act as a referee at law. *Farmers' Loan and Trust Co. v. Central Railroad*, 1 McCrary, 332.

Rule 74. — Time for presenting Reference to Master.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

Rule 75. — Master to assign a Time for Hearing, and give Notice.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.

Rule 76. — Report of Master.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

1. (July, 1880.) In this case, a question of fact arose on the pleadings, which either party might have tried and determined on evidence taken according to the usual course, before the cause went to the master. The cause went to the master by consent, without the trial of that issue. The master determined that issue on conflicting testimony, in accordance with the views of the plaintiff. The defendant excepted to the report as to the finding on that issue. *Held*, that the finding of the master could not be reviewed by the court. *Bridges v. Sheldon*, 18 Blatchf. 295.

2. (Dec., 1880.) The finding of a fact, by a master, on conflicting evidence, claimed to be against the weight of the evidence, will not be set aside, although the court may differ with him as to the weight of the evidence. *Bridges v. Sheldon*, 18 Blatchf. 507.

3. (May, 1870.) When a report upon a receiver's account is

submitted by a master, the duty of the court consists in reviewing the principles and rules adopted by the master in allowing the accounts rather than in examining the items in detail, or the evidence on which they are founded. *Cowdrey v. Railroad Co.*, 1 Woods, 331.

4. Except in extraordinary cases, the submission by the receiver, at frequent intervals, of his accounts to the master, giving the latter an opportunity to disallow whatever he may not approve, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. *Ib.*

5. The question of allowance to the receiver for his services is one that properly belongs to the master's office, and not to the court. *Ib.*

6. (June, 1877.) The presumptions are in favor of the findings of the master. They will not be disturbed unless shown to be erroneous. *Lockhart v. Horn*, 3 Woods, 542.

Rule 77. — Authority of Master.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

1. (Feb., 1826.) "I admitted said Asa to make oath to all charges, whether for money, specific articles, or services, which, from the circumstances of the parties, or the nature of the charge itself, could not, in my opinion, be proved by vouchers or other legal evidence." This rule, adopted by the master, is, in our opinion, one to which Handy could make no just objection. *Harding v. Handy*, 11 Wheat. 127.

2. (Dec., 1869.) In taking an account, the master is not limited to the date of entering the decree; he can extend it down to the time of the hearing before him. *Rubber Company v. Goodyear*, 9 Wall. 788.

3. (May, 1847.) A party may be allowed to take depositions before a master in chancery, after due notice, but without filing the usual interrogatories previously, if the evidence is to be derived from books, chiefly, not yet examined. *Russell v. McLellan*, 3 Woodb. & M. 157.

4. An order is proper, in a bill in chancery, to produce books before a master, or in court, which may be in the possession or control of the respondent, and be referred to, though generally, in the answer. *Ib.*

5. If the respondent offer an affidavit that he has no such books in his possession, it will not prevent the order, but may be satisfactory to the master in his favor. *Ib.*

6. If it turn out to be so, the court will not, in ordinary cases, recommit them to the master for further interrogatories, but consider his decision final, unless specific mistakes are pointed out. *Ib.*

7. But the court will give a *subpœna duces tecum* for any witness to bring in the books who is supposed to have them, and will aid to ferret out and punish any evasion of its order. *Ib.*

8. (Aug., 1856.) On a reference to a master, in an equity suit, for the infringement of a patent, to take an account, a defendant cannot be examined as a witness in his own favor, if objection be made by the plaintiff. *Foote v. Silsby*, 3 Blatchf. 507.

9. Nor can a defendant be so examined on his own behalf by his own counsel, even though he was first called and examined as a party by the plaintiff, or was sworn by the master upon the plaintiff's application. *Ib.*

10. The practice of courts of equity as to the examination of parties, on a reference to a master, stated. *Ib.*

11. (Sept., 1857.) In a patent suit in equity, the proper practice is, in taking an account of profits before a master, to take it down to the time of the hearing before the master, if the infringement continues to that period. *Tatham v. Lower*, 4 Blatchf. 86.

12. Where the defendants have not all of them been jointly concerned in the infringement, for the whole time covered by the account, their several liability must be apportioned in making up the decree. *Ib.*

13. The mode of arriving at such profits, under a patent for machinery for the manufacture of lead pipe. *Ib.*

14. (May, 1871.) A corporation, a party to the suit, was directed by an order of the court, in the suit, to do a specific thing to effectuate the relief to which the defendants were declared to be entitled, and it was referred to a master to superintend the doing of such thing. The master ordered the production before him, by the corporation and by its president, of certain specified books and documents of the corporation. The president refused to produce them, and an attachment for contempt was issued against him by the court, non-bailable until the books and documents should be produced. *Erie Railway Co. v. Heath*, 8 Blatchf. 413.

15. Under such circumstances, an officer of the corporation can be compelled, by *subpœna duces tecum*, to bring its books from its office, and produce them before the master. *Ib.*

16. The authority to require their production is conferred by Rule 77 of the rules in equity prescribed by the Supreme Court. *Ib.*

17. (Jan., 1880.) The defendants having, with the leave of the court, filed several pleas, some to the whole bill and some to parts of the bill, and having set forth therein the existence of certain records, being judgments in suits at law, which were pleaded in bar, the court, on motion of the plaintiff, and before he had replied to the pleas or set them down for argument, made an order referring it to a master to ascertain and report as to the truth of the existence of records in any way corresponding with those set forth in the pleas, and to return copies of the records, unless the defendants should file, with the pleas, copies of the records. *Emma Silver Mining Co., Limited, v. Emma Silver Mining Co. of New York*, 17 Blatchf. 389.

18. (April, 1871.) Under the statutes of the United States, in actions against executors, administrators, or guardians, "neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or

required to testify thereto by the court." An *ex parte* order obtained by complainant, before process issued, for his own examination as a witness, does not qualify him as such on the ground that he is required by the court to testify. *Eslava v. Mazange's Adm'r*, 1 Woods, 623.

19. The reservation of power in the court to require the evidence to be taken was made in order to provide for such extreme and special cases as might arise, in which it would be a great hardship not to take it. *Ib.*

20. Where a bill was filed to set up a parol trust in real estate against the heirs and administrators of a deceased person, and an execution creditor of the complainant, who had levied on the property, was made a defendant, and had filed a cross-bill, such execution creditor could be considered as "the opposite party" referred to in the act of Congress who is authorized to call the complainant as a witness. The "opposite party" is that party against whom the evidence is sought to be used. *Ib.*

Rule 78. — Summoning Witnesses. Fees. Attachment for Non-Attendance. Examination Viva Voce.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

1. (May, 1879.) Equity Rule 78 does not change the English practice, and does not allow, generally, the oral examination of witnesses on the trial. It permits witnesses to be so examined

merely to verify some document referred to in the pleadings, or to establish some fact of a formal character which has been inadvertently omitted in the testimony. *Railroad Co. v. Drew*, 3 Woods, 692.

Rule 79. — Manner of accounting before a Master.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.

Rule 80. — Affidavits, Depositions, &c., to be used before the Master.

All affidavits, depositions, and documents which have been previously made, read; or used in the court, upon any proceeding in any cause or matter, may be used before the master.

Rule 81. — Creditor, &c., may be examined before Master.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

Rule 82. — Circuit Courts may appoint Masters. Compensation. Attachment for Compensation.

The Circuit Courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the Circuit Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but, when the com-

pensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

1. (Nov., 1874.) A final decree in an equity suit awarded a decree against the defendant in favor of the plaintiff, for a sum named, and then decreed that the defendant pay to the master \$500, allowed to him as his compensation, less such sum as the defendant had paid to the master, and that the plaintiff have execution for the sum awarded to him. The defendant paid to the master \$35 on account of the \$500, and refused to pay more. He appealed to the Supreme Court from the whole of the decree, and gave a bond to the plaintiff sufficient to cover the amount awarded to the plaintiff and to stay the execution, and a citation was issued and served. The master applied for an attachment against the defendant for the \$465. *Held*, that the bond did not cover the amount directed to be paid to the master, and was not a bond to the master; that the provision for the payment of the master was not subject to be stayed by the proceedings for appeal; and that the attachment must be granted. *Myers v. Dunbar*, 12 Blatchf. 380.

Rule 83.—Exceptions to Report of Master.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order-book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

1. (Feb., 1826.) Exceptions to the report of a master are to be regarded by the court only so far as they are supported by the special statements of the master, or by a distinct reference to the particular portions of testimony on which the party excepting relies. The court does not investigate the items of an account,

nor review the whole mass of testimony taken before the master. *Harding v. Handy*, 11 Wheat. 104.

2. Rules of practice in accounting before a master. *Ib.*

3. (Jan., 1833.) A complex and intricate account is an unfit subject for examination in a court, and ought always to be referred to a commissioner to be examined by him and reported, in order to a final decree. To such report the parties may take any exceptions, and thus bring any question they may think proper before the court. *Dubourg de St. Colombe v. United States*, 7 Pet. 625.

4. (Jan., 1845.) Where exceptions are taken to a master's report, it is not necessary for the court formally to allow or disallow them on the record. It will be sufficient if it appears from the record that all of them have been considered by the court, and allowed or disallowed, and the report reformed accordingly. *Oliver v. Piatt*, 3 How. 334.

5. (Dec., 1853.) The report having been recommitted to the master, with instructions to ascertain the amount of profits which might have been realized with due diligence, and the master having framed his report upon the theory of awarding damages, this report, and the order of the court confirming it, were both erroneous. *Livingston v. Woodworth*, 15 How. 546.

6. (Dec., 1855.) No objections to a master's report can be made which were not taken before the master; nor after a decree *pro confesso* can a defendant go before the master, without a special order; but the accounts are to be taken *ex parte*. *McMicken v. Perin*, 18 How. 507.

7. (Oct., 1847.) The report of a master in chancery, like the verdict of a jury, relates only to facts, and as to them will not be reconsidered and set aside, unless some clear mistake or abuse of power is shown. *Mason v. Crosby*, 3 Woodb. & M. 258.

8. The burden of proof is on the party objecting to the report. *Ib.*

9. If a master err in some respects, which do not appear to have produced results materially different from what would otherwise have happened, it is no ground for setting aside or recommending his report. *Ib.*

10. (May, 1868.) Upon the final hearing of a cause in equity a final decree was entered, and the cause referred to a master, to take, and state to the court, an account of all gains and profits

made by the defendants. No report was made by the master; but the following entries were made upon the docket: "May 27th. Master's certificate upon settlement of interrogatories, with state of facts, and schedule, filed." "Roll containing nine drawings filed with certificate." "May 31st. Exceptions to master's certificate and report filed." *Ordered*, that the filings entered by the clerk be stricken out, and that the several papers filed be returned by the clerk to the master. *Union Sugar Refinery v. Mathiesson*, 3 Cliff. 146.

11. Explanation of the correct practice in this circuit, where a cause has been referred to a master to state an account. *Ib.*

12. In case the decretal order was ambiguous, the master might have authority to report the case back for more specific instructions. *Ib.*

13. The court might have power to revise each act of the master, as it progressed; but such a practice would be productive of delay, and will not receive countenance from the court. *Ib.*

14. The correct method is for a master, if possible, to complete his investigations under the rules, make up his draft report, file it in the clerk's office, and give time for the parties to make their objections thereto. *Ib.*

15. (May, 1878.) Courts of equity may, in certain cases, give the parties a new hearing; but nothing of that kind will be allowed in a hearing on exceptions to a master's report. *Felch v. Hooper*, 4 Cliff. 489.

16. (March, 1869.) An exception should always be taken on the spot to each ruling of a master which a party intends to contest. It need not then be drawn up in form; but it should be taken by giving notice to the master; and it is his duty to note the fact in his minutes. *Troy Iron and Nail Factory v. Corning*, 6 Blatchf. 328.

17. Where a master admits evidence that is objected to, and reserves the questions arising on the objection, and afterward omits to pass on the objection, or decides upon it in a manner claimed to be incorrect, the first opportunity should be taken to except to his omission or alleged error in such particular. *Ib.*

18. The serving of the draft report of the master, and the filing of objections thereto, is such an opportunity; and if such objections do not embrace such exceptions, it is too late to take such

exceptions by way of exception to the final report of the master. *Ib.*

19. If it is proper to except at all to the final report of the master, for rulings admitting or rejecting evidence, this can only be done where objections of the same kind have been made to the draft report. *Ib.*

20. It is somewhat doubtful whether, strictly, any exceptions to the master's rulings on the admission or rejection of evidence can be properly embraced in exceptions to the master's final report. *Ib.*

21. Reasons for applying the rule strictly in this case, and for overruling exceptions taken to the final report of the master, in respect of rulings made by him as to the admission and rejection of evidence. *Ib.*

22. (July, 1878.) Exceptions by the plaintiff to the master's report, founded on the admission of testimony objected to, held to be immaterial, because, the plaintiff having failed to give adequate evidence as to profits and damages, the defendants were not put on their defense in that respect, and it was unimportant whether they gave competent evidence or no evidence. *Garretson v. Clark*, 15 Blatchf. 70.

23. Certain exceptions overruled, as too general. *Ib.*

24. (Dec., 1880.) Exceptions to a master's report, in this case, were held to have been filed in time. *Bridges v. Sheldon*, 18 Blatchf. 507.

25. (April, 1807.) The court observed that where accounts were referred to a master, they would not settle principles previous to taking an account, but they must be brought before them on exceptions. *Vanderwick v. Summerl*, 2 Wash. 41.

26. (Oct., 1811.) It is no reason for referring accounts back to the commissioner who made the report, that one of the parties suggests that since it was made he has obtained evidence in support of his exceptions, and that he expects he will be able to discover new debts and credits not now known to him. The new evidence may be read when the exceptions are argued. *Camac v. Francis*, 3 Wash. 108.

27. (May, 1821.) There is no positive rule in this court forbidding a report to be considered at the term to which it is made. The general practice has been to permit a report in any degree complex to lie for a second term, for consideration and exception,

on the motion of one of the parties. In plain cases the report is generally taken up at the first term. *Coates's Executrix v. Muse's Adm'r*, 1 Brock. 530.

28. (April, 1871.) The rule of practice is, that no exceptions to a master's report will be heard by the court, which have not been made before the master; and in the absence of very special circumstances, the court will feel bound to enforce it. *Gaines v. New Orleans et al.*, 1 Woods, 104.

29. Unless some particular matter is pointed out, in which the master has committed an error, or unless it be shown that he has adopted some erroneous principle, on which his account or other calculation is based, his report will be allowed to stand. *Ib.*

30. (May, 1870.) When the accounts of a receiver are referred to a master for report, no exceptions thereto will be considered by the court, unless first made before the master. *Cowdrey v. Railroad Co.*, 1 Woods, 331.

31. This rule would not, however, deter the court from directing an account to be reformed which contained manifest errors, or clearly improper charges. *Ib.*

32. Exceptions to a master's report do not lie in such cases [where a receiver submits his accounts to the master for inspection, under the order of the court]. Nevertheless, if the master adopt an erroneous principle in allowing a receiver's account, the court, on petition, will refer the matter back to him for correction. *Ib.*

33. (Dec., 1875.) Exceptions to the report of a master should be precise, and raise well-defined issues. When they are vague and general, and require of the court the performance of duties which properly belong to the master and counsel, they will be overruled. *Stanton v. Railroad Co.*, 2 Woods, 507.

34. (Oct., 1869.) It is no ground for setting aside a master's report, in a suit in chancery, that he was not sworn; there being no statute of the United States, or any rule of court, requiring a master's report to be under oath. *Thompson & Groom v. Smith*, 2 Bond, 320.

35. It is competent for the court, in the order of reference, to require the master to be sworn; but if not specially so ordered, it is no objection to the report that he was not sworn. *Ib.*

36. There is no reason for requiring an oath where the judge

or court ordering the reference has personal knowledge of the integrity and intelligence of the person appointed. *Ib.*

37. (July, 1873.) Where exceptions did not point out wherein the master erred, and the counsel do not direct the attention of the court to the evidence establishing the alleged error, such exceptions will be overruled. *Turrill v. Railroad Co.*, 5 Biss. 345.

Rule 84. — Costs on Exceptions.

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the costs to be fixed in each case by the court, by a standing rule of the Circuit Court.

1. (Oct., 1879.) An allowance is not proper, in a bill of costs in this court, of a solicitor's fee for an overruled exception to a master's report, because, under Rule 84 in equity, no standing rule has ever been made by this court on the subject, and because no allowance for such a fee is found in sec. 824 of the Revised Statutes of the United States. *Garretson v. Clark*, 17 Blatchf. 256.

Rule 85. — Decrees. Clerical Errors.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

1. (June, 1829.) All decrees in the courts of the United States are deemed to be enrolled at the term in which they were passed. *Dexter v. Arnold*, 5 Mason, 303.

Rule 86. — Form of Decrees and Orders.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case

may be) at this term, and was argued by counsel ; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz. : " [Here insert the decree or order.]

1. (Feb., 1805.) A decree for a sale of mortgaged property, upon a bill to foreclose, is a final decree, from which an appeal will lie. *Ray v. Law*, 3 Cranch, 179.

2. (Feb., 1810.) After an issue ordered, a court of equity may proceed to a final decree, without trying the issue or setting aside the order. *Field v. Holland*, 6 Cranch, 8, 9.

3. (Feb., 1818.) The Circuit Courts have no power to set aside their decrees in equity on motion after the term at which they are rendered. *Cameron v. M'Roberts*, 3 Wheat. 591.

4. (Feb., 1820.) In equity, a final decree cannot be pronounced until all the parties in interest are brought before the court. *Marshall v. Beverley*, 5 Wheat. 313.

5. (Feb., 1820.) A final decree in equity, or an interlocutory decree, which in a great measure decides the merits of the cause, cannot be pronounced until all the parties to the bill, and all the parties in interest, are before the court. *Conn v. Penn*, 5 Wheat. 424.

6. (Feb., 1821.) A decree cannot be pronounced, on the testimony of a single witness, unaccompanied by corroborating circumstances, against a positive denial by the defendant of any matter directly charged by the bill in the defendant's answer, or answer in support of his plea. *Hughes v. Blake*, 6 Wheat. 453.

7. (Feb., 1822.) It is a settled rule that the decree must conform to the allegations in the pleadings as well as to the proofs in the cause. *Crocket v. Lee*, 7 Wheat. 522.

8. (Feb., 1825.) A decree must be sustained by the allegations of the parties, as well as by the proofs in the cause, and cannot be founded upon a fact not put in issue by the pleadings. *Carneal v. Banks*, 10 Wheat. 181.

9. (Jan., 1828.) A bill had been filed originally for discovery, and afterwards became a bill for relief. The relief prayed for was a forfeiture, which might be enforced at law. Under such circumstances, it was proper to dismiss the bill, so far as it sought for relief against the forfeiture ; but the dismissal should have been without prejudice to the legal rights of the parties, as an absolute dismissal might be considered as a decree against the

title the plaintiff claimed, and which, by the bill and the evidence obtained under it, he sought to establish. *Horsburg v. Baker*, 1 Pet. 232.

10. (Jan., 1832.) The complainants filed a bill for a perpetual injunction, and to oblige the appellees to deliver up a deed of conveyance of lands, and which deed, in a suit between the parties, had been declared by the court void on its face. "The court is well satisfied that this would be a proper case for a decree according to the prayer of the bill, if the defectiveness of the conveyance was not apparent on its face, but was to be proved by extrinsic testimony." But where the defectiveness is so apparent, the court will not order the deed to be delivered up. *Peirsoll v. Elliott*, 6 Pet. 95.

11. The defendants in their answer insist on their title, both at law and in equity; and on being left free to assert that title, if they shall choose so to do. A general dismissal of the bill with costs, the court assigning no reason for that dismissal, may be considered as a decree affirming the principles asserted in the answer, as leaving the defendants at full liberty to assert their title in another ejectment, and as giving some continuance to that title. The decree of the Circuit Court dismissing the complainants' bill ought to be so modified as to express the principles on which the bill is dismissed, so as not to prejudice the complainants. *Ib.*

12. (Jan., 1839.) In England, the decree always recites the substance of the bill and answer, and the pleadings, and also the facts on which the court founds its decree. But in America the decree does not ordinarily recite these, and generally not the facts on which the decree is founded. But with us the bill and answer, and other pleadings, together with the decree, constitute what is properly considered as the record. *Whiting v. Bank of United States*, 13 Pet. 6.

13. (Jan., 1842.) A court of chancery, acting *in personam*, may well decree the conveyance of land in any other State, and may enforce their decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court. *Watkins v. Holman*, 16 Pet. 26.

14. (Jan., 1842.) The court, under the prayer in a bill in chancery for general relief, will grant such relief only as the case

stated in the bill, and sustained by the proof, will justify. *Hobson v. M'Arthur*, 16 Pet. 182.

15. (Jan., 1848.) The attention of the Circuit Courts is called to the propriety of merely announcing their opinion in an interlocutory order, and withholding a decree setting aside titles and conveyances until the case is ready for a final decree. *Forgay v. Conrad*, 6 How. 201.

16. The difference between the English and American practice upon this subject explained. *Ib.*

17. (Jan., 1850.) A decree for a sale, made with the approbation of counsel, filed in court, removes all preceding technical objections. *Kennedy v. Georgia State Bank*, 8 How. 586.

18. (Jan., 1850.) Where the surety had been compelled to pay the whole amount of his bond before a third party recovered judgment, the surety ought to have been relieved against an execution by this third party. *Humphreys v. Leggett*, 9 How. 297.

19. Not having been allowed to plead *puis darrein continuance*, and protect himself in this way by showing that he had paid the full amount of his bond, the surety ought to have been relieved in equity, where he had filed a bill for relief. *Ib.*

20. (Jan., 1850.) A bill being filed to compel the specific execution of a contract relating to land, where the defendants were out of the state, the court passed a money decree, and ordered the sale of other lands than those mentioned in the bill.

This decree was void, and no title passed to the purchaser at the sale ordered by the decree. *Boswell v. Otis*, 9 How. 336.

21. The act did not authorize such an act of general jurisdiction. A special jurisdiction only was given *in rem*. *Ib.*

22. Jurisdiction is acquired in one of two modes: first, as against the person of the defendant, by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment, beyond the property in question. *Ib.*

23. (Dec., 1853.) Moreover, in the present case, the parties consented to the decree under which the account in controversy was adjusted.

That consent having been given, however, to a decree by which an account should be taken, of gains and profits, according to the prayer of the bill, the defendant was not precluded,

from objecting to the account, upon the ground that it went beyond the order. *Livingston v. Woodworth*, 15 How. 546.

24. (Dec., 1853.) Where a case in equity was referred to a master, which came again before the court, upon exceptions to the master's report, the court had a right to change its opinion from that which it had expressed upon the interlocutory order, and to dismiss the bill. All previous interlocutory orders were open for revision. *Fourniquet v. Perkins*, 16 How. 82.

25. (Dec., 1854.) Under a prayer for general relief, the court can decree for an account of profits. This right is incident to the right to an injunction in copy and patent right cases. *Stevens v. Gladding*, 17 How. 448.

26. (Dec., 1862.) Where a lien creditor brings a bill in behalf of himself and other creditors of the same class, and with similar rights, the decree should provide proper relief for all of them. *Canal Co. v. Beers*, 2 Black, 448.

27. (Dec., 1862.) The court will not be in a condition to make a final decree until all the facts upon which the rights of the parties depend are ascertained. *Ogilvie v. Knox Ins. Co.*, 2 Black, 539.

28. (Dec., 1862.) A decree affirmed, dismissing a bill for a private nuisance, in which the nature of the injury was not set out in such a manner as to show that the plaintiff was without a legal remedy. *Parker v. Winnipiseogee Lake Cotton & Woollen Co.*, 2 Black, 545.

29. (Dec., 1863.) A decree *nunc pro tunc* is always admissible where a decree was ordered or intended to be entered, and was omitted to be entered only by the inadvertence of the court; but a decree which was not actually meant to be made in a final form cannot be entered in that shape *nunc pro tunc*, in order to give validity to an act done by a judicial officer, under a supposition that the decree was final instead of interlocutory. *Gray v. Brignardello*, 1 Wall. 627.

30. (Dec., 1866.) A decree dismissing a bill for matters not involving merits is no bar to a subsequent suit. *Hughes v. United States*, 4 Wall. 232.

31. (Dec., 1868.) In cases where relief is sought on the ground that the patent [for land] was issued to one person, while the right was in another, the decree should not annul or set aside the patent, but should provide for transferring the title to the person equitably entitled to it. *Silver v. Ladd*, 7 Wall. 219.

32. (Dec., 1868.) A decree of strict foreclosure, which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, cannot, in the absence of some special law authorizing it, be sustained. *Clark v. Reyburn*, 8 Wall. 318.

33. (Dec., 1869.) Where there is a fund in court to be distributed among different claimants, a decree of distribution will not preclude a claimant not embraced in its provisions, but having rights similar to those of other claimants who are thus embraced, from asserting by bill or petition, previous to the distribution, his right to share in the fund, and in the prosecution of his suit, he is entitled, upon a proper showing, to all the remedies by injunction or order which a court of equity usually exercises to prevent the relief sought from being defeated. *In the Matter of Howard*, 9 Wall. 175.

34. (Dec., 1869.) Motion made on the foot of a decree, against a defendant, to compel an account, when the decree, by its terms, limited the accounting to the date of service of process in the suit, denied, where the property for which the account was asked was received (if received at all) after such service, and where, in addition, the original decree, which charged all those defendants against whom proofs existed, did not charge the one now sought to be charged, and where the proofs on the motion were no other than the proofs at the original hearing. *Texas v. Chiles*, 10 Wall. 127.

35. (Dec., 1869.) A mortgage to secure such a note (given for stocks), being given upon the grantee's interest as a stockholder in the property of the company, the equity of redemption is not extinguished by proceedings to foreclose the same during the war, when such proceedings were taken within the Union lines, whilst the defendants were absent in the Confederate lines, and were prohibited from entering the Union lines. *Dean v. Nelson*, 10 Wall. 158.

36. (Dec., 1870.) A decree in equity, in one of the loyal states, against a party who, having been engaged in the rebellion, was at the time a prisoner of war of the United States, outside of the state, and against whom there was no service of process, or any step taken to bring him before the court, is void; and any sale under it is also void. *Railroad Co. v. Trimble*, 10 Wall. 367.

37. (Dec., 1870.) If a case presented by a creditor's bill is tried like a common-law case, that is to say, by a jury, and a decree is entered on the verdict as a mere conclusion of law upon the facts found, and not as the result of the Chancellor's own judgment, though of his judgment aided by the finding, it is error. *Dunphy v. Kleinsmith*, 11 Wall. 610.

38. A decree on a creditor's bill, which makes the defendant who has co-operated with the debtor responsible for damages which the creditor has suffered in consequence of the conveyance sought to be avoided, is erroneous. On such a proceeding he is liable but to account. If damages are sought against him, they should be sought by a proceeding at law. *Ib.*

39. (Dec., 1872.) A final decree on the merits cannot be made separately against one of several defendants, upon a joint charge against all, where the case is still pending as to the others. *Frow v. De La Vega*, 15 Wall. 552.

40. If one of several defendants to a bill making a joint charge of conspiracy and fraud make default, his default and a formal decree *pro confesso* may be entered, but no final decree on the merits until the case is disposed of with regard to the other defendants. The defaulting defendant is simply out of court, and can take no farther part in the cause. *Ib.*

41. If the bill in such case be dismissed on the merits, it will be dismissed as to the defendant in default, as well as the others. *Ib.*

42. (Dec., 1872.) And it [the Circuit Court in equity] will give the lessor the full value of the goods sold, clear of all expenses, whether the assignee [in bankruptcy] obtained that value or not (limited, of course, by the amount of rent which he is entitled to have paid to him), and also to all the taxable costs to which he has been put by the litigation. Damages beyond this refused as hardly due in the particular case, and at any rate, more properly to be claimed in a proceeding at law. *Marshall v. Knox*, 16 Wall. 551.

43. (Oct., 1874.) Where an original bill was filed in a state court by a trustee of lands, against two persons, B. and C., charging both with a fraudulent purchase of the land, and charging B. with a receipt of the rents, but not so charging C., and a final decree was made charging B., but not charging C., it was grossly irregular, in an amended bill filed after such final decree,

to charge C. with the rents ; and a decree *pro confesso* against C., so charging him, — he having had no knowledge of the amended bill, and no proof being made of the truth of the allegations of the bill, and he, on obtaining knowledge of the bill, denying all its allegations, — was rightly annulled *in toto* by the Circuit Court of the United States, on the case being removed from the state court into the Circuit Court. *French v. Hay*, 22 Wall. 238, 669.

44. But the decree against B. was not rightly annulled ; the decree in the state court, on the original bill against him for rents, having been *res judicata* and unimpeachable as to everything covered by it. *Ib.*

45. The amended bill above mentioned, in the state court, having charged B. with damage to certain furniture in the premises with whose rents he had been charged, and an issue having been directed by the state court to be tried as to that matter, and B. having had leave to answer the amended bill, — *Held*, further, that as to that matter the decree of the state court should not have been annulled *in toto*, and things put as if nothing had been done ; but that the Circuit Court should have ascertained by a jury or by a master the amount of damages, and have decreed accordingly. *Ib.*

46. (Oct., 1874.) This court calls the attention of the Circuit Courts to what was said by Taney, C. J., in *Forgay v. Conrad* (6 How. 201), as to the care which ought to be exercised in the preparation of decrees of foreclosure ; and observes that much time of this court, and expense of litigants, will be saved if more attention is given to the form of decrees when entered. *Railroad Co. v. Swasey*, 23 Wall. 406.

47. (Oct., 1875.) The holder of the notes of an insolvent bank, the stockholders whereof are liable for so much of the just claims of creditors as remain unpaid after the assets of the bank shall be exhausted, filed a bill in equity to wind up the affairs of the institution, under the provisions of its charter. The stockholders were not made parties, nor served with process ; nor was any motion, petition, or prayer filed to subject them to liability. *Held*, that so much of the final decree as discharged them from all liability for and on account of any debt or demand against them or the bank was erroneous. *Terry v. Commercial Bank*, 2 Otto, 454.

48. (Oct., 1876.) The power of a court of equity to cancel an executed contract ought not to be exercised, unless the fraud and false representations set up as the ground for relief are clearly proved, and the complainant has been thereby deceived and injured. *Atlantic Delaine Co. v. James*, 4 Otto, 207.

49. (Oct., 1876.) A decree foreclosing a mortgage executed by the Chicago and Southwestern Railroad Company, of its entire railroad and franchises, and ordering a sale of them, passed by the Circuit Court of the United States for the District of Iowa, which, in a suit there pending, had jurisdiction of the mortgagor and the trustees in the mortgage, is not invalid because a part of the property ordered to be sold is situate in the State of Missouri. *Muller v. Dows*, 4 Otto, 444.

50. (Oct., 1877.) The Merchants' Bank of South Carolina, at Cheraw, suspended specie payments Nov. 13, 1860, and never thereafter resumed. Its charter contains a provision that, "in case of the failure of the said bank, each stockholder, copartnership, or body politic having a share or shares in the said bank at the time of such failure, or who shall have been interested therein at any time within twelve months previous to such failure, shall be liable and held bound individually for any sum not exceeding twice the amount of his, her, or their share or shares." To enforce this provision, A., Dec. 2, 1870, filed, for himself and other note-holders, a bill in the Circuit Court, against the receiver of the bank, its cashier, five of its directors, and some sixty others, as stockholders, alleging, among other matters, that he was a citizen of Virginia, but making no averment touching the citizenship of the other note-holders or of the defendants. Such citizenship does not appear by the record, and the bank was not made a party. Twenty of the defendants were served with process, and the others did not enter an appearance. Dec. 15, 1874, a final decree was rendered, which, after declaring that the persons who held shares of stock in said bank "on the first day of the month of March, A. D. 1865, or who were interested therein within twelve months previous to said first day of March, 1865, are liable and are held bound individually to the complainants for a sum not exceeding twice the amount of the share or shares held by said stockholders respectively," and reciting the names of over sixty of such stockholders, the number of shares held by each, and the amount for which each was liable, together with the

names of five bill-holders, in addition to A., and the amount due to each of them, awards judgment and execution against the defendants, stockholders as aforesaid, for the amount due said bill-holders respectively, besides costs. *Held*, 1. That the citizenship of the parties is not sufficiently shown to give the court below jurisdiction; and, were it otherwise, the decree is erroneous, in that it was taken against parties not served, and against the defendants jointly, while a several liability was imposed by the charter upon each stockholder, not to exceed twice the amount of his shares. *Godfrey v. Terry*, 7 Otto, 171.

51. (Oct., 1878.) A., a citizen of Tennessee, filed his bill in the Circuit Court of the United States sitting in that state, against B., a citizen of Ohio. A corporation created by the laws of Tennessee was an indispensable party to any relief to A. which a court of equity could give. The court, on a final hearing upon the pleadings and proofs, dismissed the bill. *Held*, that the dismissal should have been without prejudice. *Kendig v. Dean*, 7 Otto, 423.

52. (Oct., 1878.) When there is a demurrer to the whole bill, and also to part, and the latter only is sustained, the proper decree is to dismiss so much of the bill as seeks relief in reference to the matters adjudged to be bad, overrule the demurrer to the residue, and direct the defendant to answer thereto. *Powder Company v. Powder Works*, 8 Otto, 126.

53. (Oct., 1878.) Though the specific relief sought was a strict foreclosure, a decree for a sale of the property and for the enforcement of the agreement contained in the deed was, under the prayer for general relief, appropriate. *Sage v. Central Railroad Co.*, 9 Otto, 335.

54. (Oct., 1879.) The Circuit Court, when its decree is affirmed and the mandate filed there, must record the order of this court, and proceed with the execution of the decree. *Durant v. Essex Company*, 11 Otto, 555.

55. (Oct., 1880.) Where the complainant dies after the term at which the cause on its submission for final hearing upon the pleadings and proofs was continued by an order of *curia advisare vult*, the decree in his favor entered as of that term cannot be impeached by the defendants upon the ground that it was rendered subsequently to his death. *Mitchell v. Overman*, 13 Otto, 62.

56. (Nov., 1854.) An account of profits may be decreed to the owner of a copyright, as incidental to the relief by injunction, but it must be prayed for in the bill. *Stevens v. Cady*, 2 Curt. C. C. 200.

57. Such an account cannot embrace penalties. *Ib.*

58. (May, 1871.) The correct practice is, where infringement to any extent is admitted, if the patent is held to be valid, to enter an interlocutory decree for complainant, and send the cause to a master, to ascertain the amount the complainant is entitled to recover. *Carew v. Boston Elastic Fabric Co.*, 3 Cliff. 357.

59. Actual damages are assessed in the first instance ; but the court may, in its discretion, increase the amount to a sum not exceeding three times the amount estimated and assessed as the actual damages sustained, beyond the gains and profits realized by the respondents. *Ib.*

60. (May, 1874.) Whether, in a suit brought against the respondents as copartners, but in which the proofs fail to show a partnership, but do show that the respondents, with others, were organized into a corporation, with the same name as the alleged copartnership, it would be competent for the court to enter a decree against the corporation, *quære*.

In such case, the court will not delay the hearing of the cause ; since the defect, if it be one, may be cured by an amendment. *Needham v. Washburn*, 4 Cliff. 254.

61. (March, 1872.) In a suit in equity for the infringement of letters-patent, brought before the passage of the act of July 8, 1870 (16 Stat. at Large, 206, 216, secs. 55, 111), both profits and damages cannot be recovered.

An interlocutory decree in such a suit, entered after the passage of such act, inadvertently provided for the recovery of both profits and damages. The report of the commissioner reported both profits and damages, and was excepted to by the defendant, on the ground that the damages could not be recovered in the suit. *Held*, that the point could not be raised by an exception to such report, but that, nevertheless, the court would not award any damages, and would settle the interlocutory decree so as to exclude them. *Williams v. Leonard*, 9 Blatchf. 476.

62. (Sept., 1872.) Proper form of decree, on the infringement of the fourth claim. *Rumford Chemical Works v. Lauer*, 10 Blatchf. 123.

63. (Dec., 1877.) Under the circumstances of this case, the court refused to open an interlocutory decree. *Ingersoll v. Benham*, 14 Blatchf. 362.

64. (April, 1817.) If the agreement admitted by the answer differs from that stated in the bill, the plaintiff cannot have a decree, unless he proves the contract *aliunde*. *Thompson v. Tod*, Pet. C. C. 380.

65. (Oct., 1822.) To entitle the plaintiff to take the bill *pro confesso* on account of an answer not being filed within three months after the day of appearance and bill filed, the defendant should have been ruled to answer, and the cause should be set down. The decree in this case is merely *nisi*, to be made absolute at the term succeeding that to which service of a copy of the decree shall be returned executed, unless cause is shown to the contrary. *Pendleton v. Evans's Executors*, 4 Wash. 336.

66. (April, 1823.) If the bill were taken *pro confesso* at one session of this court, and service of this decree be made and returned at the same session, it may be made absolute at the following session; otherwise, it cannot be made absolute until the third session of the court. *Pendleton v. Evans's Executors*, 4 Wash. 391.

67. (Nov., 1860.) The rights of the United States government, as a sovereign, and its prerogatives as such, are coextensive with the functions of government committed to it.

When it purchases land within a state, not intended for forts, arsenals, and other national uses, but merely to secure a debt, it takes the land as any other corporation, and cannot claim any of the immunities or prerogatives of a sovereign.

Consequently, a mortgagee may have a valid decree in chancery for the sale of the mortgaged land, where the United States is owner of the equity of redemption, on a notice given in any manner the court may prescribe.

The jurisdiction of the Chancellor to order such a sale depends on the locality of the land, and not on the domicile of the owner of the equity of redemption. The regularity of such a sale cannot be called in question in a collateral suit. *Elliot v. Van Voorst*, 3 Wall. Jr. 299.

68. (Nov., 1861.) The federal courts, sitting in equity, cannot, under the act of July 4, 1836, sec. 14, treble the damages found by them for violating a patent-right, as they may, when sitting at law, and on a verdict and judgment. *Livingston & Co. v. Jones & Co.*, 3 Wall. Jr. 330.

69. (April, 1871.) If a decree be satisfied, the execution should be arrested on motion, without a new bill. *Molyneaux's Adm'r v. Marsh*, 1 Woods, 452.

70. (April, 1871.) In case a fund can only be divided satisfactorily amongst a certain class of persons, it is necessary to frame the decree in such a manner as that all those persons may be brought in for their distributive shares; but even then the bill may often be filed by any one of them on his own behalf. *Marsh v. Burroughs*, 1 Woods, 463.

71. It is only when it appears that a distribution of such fund must be made, that a decree will be entered for the benefit of all. *Ib.*

72. (May, 1872.) When a case has been submitted to and passed upon by a court having jurisdiction, its decree cannot be collaterally impeached, except for fraud. *Jones v. Brittan*, 1 Woods, 667.

73. (May, 1872.) A party holding a first incumbrance on property about to be brought to sale, ought not to be deprived of the right of bidding on the property, up to the amount of his claim. Therefore, when his right of priority is in dispute, it ought to be settled before the sale; and whenever a specific property, on which a separate incumbrance exists, can be sold separately without injury to or sacrifice of that or other property, it should be thus sold, so as to give every incumbrancer the chance of protecting his securities without involving himself in onerous engagements. *Campbell v. Railroad Co.*, 2 Woods, 264.

74. (Sept., 1875.) Where a railway is conveyed by a trust deed, or mortgage, to secure bonds, and it cannot be divided and sold in pieces without manifest injury to its value, the whole may be sold before the principal is due, on default in the payment of interest. *Wilmer v. Railway Co.*, 2 Woods, 447.

75. The Atlanta and Richmond Air Line Railway Company conveyed to trustees, by a single deed, all its line of road extending from Atlanta, Georgia, through South Carolina to Charlotte, North Carolina, to secure the payment of a series of bonds issued by the railway company; and the railroad was an indivisible and inseparable piece of property, which could not be divided without injury to its value. *Held*, that the court had jurisdiction to decree that the trustees should sell the entire line of road, according to the terms of the trust, notwithstanding a large part

of the road lay beyond the territorial jurisdiction of the court; and that a sale and deed under such decree would convey a good title to the whole property. *Ib.*

76. (July, 1873.) Parties who have withdrawn their answer and consented to a decree, cannot afterwards ask to have proceedings on the decree suspended. *Anderson v. Railroad Co.*, 2 Woods, 628.

77. A consent decree was entered, upon the basis of a certain agreement between the parties, by which execution was to be suspended upon certain terms. These terms not being complied with, the execution may be enforced. *Ib.*

78. (June, 1877.) The only effect of a decree *pro confesso* is to enable the case to be proceeded with *ex parte* against the defendant as to whom it is taken. Unless followed by a final decree, it settles no rights. *Lockhart v. Horn*, 3 Woods, 542.

79. (June, 1879.) The disposal by decree of court of railroad property mortgaged to secure many bondholders, so as to protect the interests of all, is beset with difficulties. In this case, where a large proportion of the bondholders had combined to purchase the railroad, or to reorganize the company without a sale, the court allowed the non-subscribing bondholders to participate in the purchase or reorganization, on an equal footing with the others, provided they came in by a day named. *Duncan & Elliot v. Railroad Co.*, 3 Woods, 597.

80. (Oct., 1843.) A decree *pro confesso*, when irregularly entered, as a matter of course will be set aside on motion. *Fellows v. Hall & Allen*, 3 McLean, 281.

81. (April, 1873.) If a decree of foreclosure shows that the court was apprised of the existence of infant heirs-at-law, and took measures to preserve their rights, the legal presumptions in favor of the validity of the decree are not limited by the production of the bill in which the names of such heirs are not given, but process is prayed against them generally. *Kibbe v. Dunn*, 5 Biss. 233.

82. The rule of intendment in favor of titles derived under judicial proceedings is, that the court will presume every act or thing to have been done, necessary to confer jurisdiction, which the record does not show was not done, — particularly when the record produced shows that the whole record and proceedings have not been preserved. This rule should be en-

forced in all its liberality where parties have slept upon their rights. *Ib.*

83. (May, 1873.) Previous to the entering of final decree, any interlocutory decree is subject to examination and modification. *Pullan v. Railroad Co.*, 5 Biss. 238.

84. (Oct., 1874.) Power of court over judgments, to set aside, modify, or annul, is unlimited during the term at which they were rendered. *Union Trust Co. v. Railroad Co.*, 6 Biss. 197.

85. Where a demurrer to a bill is sustained and the bill dismissed, the court may, during the term, set aside its dismissal and restore the case without losing its jurisdiction; and a state court cannot, by taking jurisdiction during this interval, oust or supersede the jurisdiction of this court. The case stands precisely as though no order of dismissal had been made. *Ib.*

86. The cases where courts have refused to set aside their judgment and proceed with the case, in order to protect their parties acting in good faith, are cases of equitable discretion, not of right, and do not contravene the rule. *Ib.*

87. (April, 1865.) The practice in the courts of equity of the United States does not require that an order be made limiting the time in which the decree rendered in the cause shall be performed, before a party may be proceeded against for non-performance of its directions. *Souter v. La Crosse Railroad*, Woolw. 80.

88. (July, 1856.) When orders and a final decree have been taken in a case pending in a court of equity, in vacation, without the sanction or knowledge of the Chancellor, the proceeding, including the decree, will not be set aside on summary motion. *Bayerque v. Jackson Water Co.*, McAll. 85.

89. When all the proceedings taken were in strict conformity with a written stipulation entered into by the parties and filed in court, and there was no mistake or fraud, and moneys have been paid and received by the respective parties on the faith of the decree, and the property has changed hands, the proceedings are at least only voidable, not void. *Ib.*

90. If injury has accrued to a party, he must file his bill and bring the whole case on its merits before the court, so that a decree may be rendered on terms doing justice to both parties. *Ib.*

91. (July, 1856.) A decree final in other respects is not

converted into an interlocutory one because it directs a taxation of costs. *Craig v. Steamer Hartford*, McAll. 91.

Rule 87.—Guardians and Prochein Amis.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

Rule 88.—Petition for Rehearing.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

1. (Oct., 1875.) The court below can grant a rehearing during the term at which the final decree was rendered, but not thereafter; and an application therefor must be addressed to that court. *Roemer v. Simon*, 1 Otto, 149.

2. (May, 1845.) Rehearings in equity are only allowed in this court where some plain omission or mistake has been made, or where something material to the decree is brought to the notice of the court which had been before overlooked. *Jenkins v. Eldredge*, 3 Story, 299.

3. (Oct., 1845.) A rehearing of a case in equity is not granted by this court, on the mere certificate of counsel as to the sufficiency of the reasons for it. *Emerson v. Davies*, 1 Woodb. & M. 21.

4. The English practice in such cases, if allowing it in all where there is such a certificate (which is doubtful), is not to be adopted here, except so far as it is reasonable, and suited to circumstances here. *Ib.*

5. (Oct., 1846.) An application for a rehearing must usually state some reason which would constitute a good ground for a new trial at common law. *Hunter v. Town of Marlboro'*, 2 Woodb. & M. 169.

6. (Oct., 1847.) A rehearing should be allowed in equity, for reasons sufficient to justify a new trial at common law, but in general only then. If it be asked so as to open the case, and offer new evidence to one of several points, the evidence must not have been known and have been neglected to be used. *Bentley v. Phelps*, 3 Woodb. & M. 403.

7. (Oct., 1847.) A rehearing will not be granted in this court merely on a certificate of counsel, stating as a reason only an error in law on a particular point. *Tufts v. Tufts*, 3 Woodb. & M. 426.

8. There should be shown, in order to justify a rehearing, some new fact or precedent, or some specific mistake. *Ib.*

9. The same court should not be asked, on the same facts, and cases, and arguments, to consume the public time, and consider whether to change its opinion or not; but such an examination belongs more properly to an appellate tribunal. *Ib.*

10. (May, 1872.) The fact that the defendant, in a suit in equity for the infringement of a patent, did not have proper expert testimony on the final hearing, is no ground for granting a rehearing, where no application was made in the premises before the final hearing, and no excuse is shown. *Hitchcock v. Tremaine*, 9 Blatchf. 550.

11. The fact that since the first hearing the defendant has discovered that a patent earlier than the plaintiff's, and which was in evidence on such hearing, has been twice reissued, the last time since such hearing, is no ground for granting a rehearing. *Ib.*

12. (Sept., 1872.) Motion to open proofs and for a rehearing granted. *Rumford Chemical Works v. Lauer*, 10 Blatchf. 123.

13. (July, 1878.) The principles stated which govern the question whether a cause shall be reargued after a decision. *Ready Roofing Co. v. Taylor*, 15 Blatchf. 94.

14. The rules stated which govern the question of granting a new trial to introduce new evidence. *Ib.*

15. The knowledge and diligence of counsel are to be considered on such questions the same as those of the party. *Ib.*

16. In this case it was held that, by the exercise of ordinary diligence, the new evidence sought to be introduced could have

been discovered, so as to be introduced at the former trial, and that it was not of such materiality and weight that it would probably change the result. *Ib.*

17. (April, 1880.) A motion for a rehearing in a suit in equity is not granted as of course in the federal courts on the certificate of two counsel, but is a matter in the discretion of the judge who made the decision. *American Diamond Rock Boring Co. v. Sheldon*, 18 Blatchf. 50.

18. A rehearing was denied in this case, it appearing that a rehearing would not, with any reasonable degree of probability, change the result. *Ib.*

19. (May, 1880.) A decision in this case having been filed (17 Blatchf. C. C. R. 484), the defendant, before the entry of an interlocutory decree, applied by a petition, signed and verified only by his solicitor, for a rehearing and the taking of further proofs. The petition was demurred to, and the demurrer was sustained, on the ground that it did not appear that the defendant could not, with reasonable diligence, have obtained the new testimony before the former hearing, the sole case set forth being that the solicitor, according to his best knowledge, information, and belief, was of opinion that the defendant supposed it had used all due diligence to obtain all competent evidence of past inventions. *Page v. The Holmes Burglar Alarm Telegraph Co.*, 18 Blatchf. 118.

20. A suggestion in the petition that the defendant may, perhaps, in the future desire to use certain of the inventions covered by the patent in a department of use new to it, and may be proceeded against for violating an injunction to be issued on the decree to be entered on said decision, and that it desires to have the decree so drawn as to accord the right to such use, and for that purpose to produce said new testimony, is not a sufficient ground for granting the prayer of the petition. *Ib.*

21. (June, 1880.) After a suit in equity for the infringement of a patent had been argued on pleadings and proofs, the defendant applied for leave to take further proofs and to reargue the case, the application being made, not because of the defendant's interest in the result, but because of the supposed effect upon the interests of a third party in certain other patents of a determination of the suit in favor of the plaintiff. *Held*, that the motion must be denied. *Schneider v. Thill*, 18 Blatchf. 241.

22. (July, 1875.) A decree taken by default, in consequence

of the neglect of counsel for the defendant, will not be opened on motion for a rehearing. *Scott v. Hore*, 1 Hughes, 163.

23. The Virginia law, settled by repeated decisions of the Court of Appeals, that a rehearing for neglect of counsel will not be granted, and never except on a bill of injunction, is observed in the United States Circuit Court for this district. *Ib.*

24. United States Circuit Courts have no power to set aside their decrees in equity, on motion, after the term at which they are rendered. *Ib.*

25. The eighty-eighth rule in equity, forbidding a United States Circuit Court, on motion, to grant a rehearing after the term, of final decrees to which appeal lies to the Supreme Court, is imperative. *Ib.*

26. (May, 1875.) Neither a petition nor an order of the court for a rehearing of itself stops proceedings under the decree, unless the court so specifically directs. *Vose v. The Trustees, &c.*, 2 Woods, 648.

27. (Oct., 1880.) A petition for a rehearing in a court of original jurisdiction, after entry of a final decree in an equity suit, is not an *ex parte* proceeding, and can only be presented on notice, and considered after the other side has had an opportunity to answer it. *Giant Powder Co. v. California Vigorit Powder Co.*, 6 Sawyer, 509.

Bill of Review.

1. (Feb., 1825.) Although bills of review are not strictly within the Statute of Limitations, yet courts of equity will adopt the analogy of the statute in prescribing the time within which they shall be brought. *Thomas v. Harvie*, 10 Wheat. 146.

2. Appeals in equity causes being limited by the Judiciary Acts of 1789, ch. 20, s. 22, and of 1803, ch. 353 [XCIII.], s. 2, to five years after the decree, the same period of limitation is applied to bills of review. *Ib.*

3. *Quære*: Whether a bill of review, founded upon matter discovered since the decree, is also barred by the lapse of five years. *Ib.*

4. It is in the discretion of the court to grant leave to file a bill of review for that cause. *Ib.*

5. (Jan., 1833.) Under the provisions of an act of Congress, passed on the 26th of May, 1824, proceedings were instituted in

the Superior Court of the Territory of Arkansas, by which a confirmation was claimed of a grant of land alleged to have been made to the petitioner, Sampeyreac, by the Spanish government prior to the cession of Louisiana to the United States by the treaty of April 3, 1803. This claim was opposed by the district attorney of the United States; and the court, after hearing evidence, decreed that the petitioner recover the land from the United States. Afterwards the district attorney of the United States, proceeding on the authority of the act of 8th May, 1830, filed a bill of review, founded on the allegation that the original decree was obtained by fraud and surprise, that the documents produced in support of the claim of Sampeyreac were forged, and that the witnesses who had been examined to sustain the same were perjured. At a subsequent term Stewart was allowed to become a defendant to the bill of review, and filed an answer, in which the fraud and forgery are denied, and in which he asserts that if the same were committed he is ignorant thereof, and asserts that he is a *bona fide* purchaser of the land, for a valuable consideration, from John J. Bowie, who conveyed to him the claim of Sampeyreac by deed, dated about the 22d October, 1828. On a final hearing, the court being satisfied of the forgery, perjury, and fraud, reversed the original decree. *Held*, that these proceedings were legal, and were authorized by the act of the 5th of May, 1830. *Sampeyreac v. United States*, 7 Pet. 222.

6. (Jan., 1839.) The bill of review must be founded on some error apparent upon the bill, answer, and other pleadings and decree; and a party is not at liberty to go into the evidence at large, in order to establish an objection in the decree, founded on the supposed mistake of the court in its own deductions from the evidence. *Whiting v. Bank of United States*, 13 Pet. 6.

7. No party to a decree can, by the general principles of equity, claim a reversal of a decree upon a bill of review, unless he has been aggrieved by it; whatever may have been his rights to insist on the error at the original hearing, or on an appeal. *Ib.*

8. According to the course of practice in the courts of the United States in chancery cases, an original decree is to be deemed recorded and enrolled as of the term in which the final decree was passed. A bill which seeks to have alleged errors revised for want of parties, or for want of proper proceedings after the decree against his heirs, after the decease of one of the parties, is

certainly a bill of review; in contradistinction to a bill in the nature of a bill of review, which lies only where there has been no enrollment of the decree. *Ib.*

9. An original bill, in the nature of a bill of review, brings forward the interests affected by the decree, other than those which are founded in privity of representation. *Ib.*

10. (Jan., 1850.) Some of the distinctions stated, between bills of review, of revivor, and supplemental and original bills in chancery. *Kennedy v. Georgia State Bank*, 8 How. 586.

11. (Dec. 1853.) Where a case is decided by an appellate court, and a mandate is sent down to the court below, to carry out the decree, a bill of review will not lie in the court below, to correct errors of law alleged on the face of the decree. Resort must be had to the appellate court. *Southard v. Russell*, 16 How. 547.

12. (Dec., 1859.) Where a bill of review was filed, alleging that the decree was obtained by fraud, which allegations were denied in the answer, and it appeared by the evidence that the complainant had lost the suit by his own neglect, the bill of review was properly dismissed by the court below. *McMicken v. Perin*, 22 How. 282.

13. (Dec., 1869.) A bill of review will not be granted, either where the party could, by an attentive examination of the exhibits attached to the bill in the original case, have discovered what he relies on as newly discovered matter, and has thus been guilty of laches; or where the court is satisfied that, upon the case offered to be made out, the decree ought to be the same as has been already given. *Rubber Company v. Goodyear*, 9 Wall. 805.

14. (Dec., 1871.) A bill of review held to have been properly entertained, on the after discovery of a lost paper; and a former decree held, on the new evidence, to have been rightly reversed. *Easley v. Kellom*, 14 Wall. 279.

15. (Oct., 1874.) On a bill of review in equity, nothing can be examined but the pleadings, proceedings, and decree, which, in this country, constitute what is called the record in the cause. The proofs cannot be looked into, as they can on an appeal. *Putnam v. Day*, 22 Wall. 60.

16. (Oct., 1875.) If the complainant desired to place the case in a position where the action of the court below could be reviewed here, he should have filed his bill of review, and supported it by depositions. Such a bill is also the appropriate

remedy where a decree has been obtained by fraud. *Terry v. Commercial Bank*, 2 Otto, 454.

17. (Oct., 1877.) The court approves the ruling in *Whiting et al. v. The Bank of the United States* (13 Pet. 6) and *Putnam v. Day* (22 Wall. 60), that the only questions open in a bill of review, except when it is filed on the ground of newly discovered evidence, or contains new matter, are such as arise upon the pleadings, proceedings, and decree. *Buffington v. Harvey*, 5 Otto, 99.

18. Should such a bill set forth the evidence in the original cause, a demurrer, specially assigning that error alone, should be sustained; or the evidence might, on motion, be stricken out; but a general demurrer must be overruled, if the bill shows any substantial error in the record. *Ib.*

19. (Oct., 1877.) None but parties and privies can have a bill of review; and it will not lie where the decree in question was passed by consent. *Thompson v. Maxwell*, 5 Otto, 391.

20. *Buffington v. Harvey* (*supra*, p. 99) cited and approved. *Ib.*

21. (Oct., 1879.) Upon a bill of foreclosure against A. and the parties to whom, after mortgaging the land, he respectively conveyed separate parcels thereof, at different times, the only question raised was as to the order in which the court should direct the parcels to be sold to satisfy the debt. From the decree rendered June 5, 1875, finding the sum due, and prescribing such order, B., one of the defendants, appealed. The decree was affirmed. Thereupon C., another defendant, filed a petition below, May 21, 1879, for leave to file a bill of review for alleged errors of law, being the same as those passed upon by this court on the appeal, and for newly discovered evidence; but, although the decree was in full force, he neither offered to pay the same or any part thereof, nor alleged any reason for not doing so. *Held*, that leave to file the bill rested in the discretion of the court below, and was properly refused. *Ricker v. Powell*, 10 Otto, 104.

22. (Oct., 1879.) Allowing, under a bill of review, the introduction of newly discovered evidence to prove facts in issue on the former hearing rests in the sound discretion of the court, to be exercised cautiously and sparingly, and only under circumstances which render it indispensable to the merits and justice of the cause. *Craig v. Smith*, 10 Otto, 227.

23. (Oct., 1880.) A bill of review is the appropriate mode of correcting errors apparent on the face of the record; and it was

in this case filed in time, less than two years having elapsed since the original decree was passed. *Clark v. Killian*, 13 Otto, 766.

24. (June, 1829.) In what cases a bill of review generally lies. *Dexter v. Arnold*, 5 Mason, 303.

25. It lies for matter of error apparent on the face of the record. What is such matter? *Ib.*

26. The error must appear on the decree and pleadings, for the evidence in the case at large cannot be examined to ascertain whether the court misstated or misunderstood the fact. *Ib.*

27. A bill of review also lies for newly discovered evidence material to the issue, if such evidence was not known until after the period in which it could be used in the cause. *Ib.*

28. No bill of review will lie if the newly discovered evidence could have been obtained by reasonable diligence before the original hearing. *Ib.*

29. *Quære*: Whether a bill of review lies upon new matter not in issue in the original cause; but which shows the decree erroneous. *Ib.*

30. It does not lie where the party seeks to set out a new title, and not to support the title in the original cause. *Ib.*

31. A bill of review lies for the party who obtained the original decree in his favor, if the original decree was injurious to him. *Ib.*

32. A bill of review lies for error in law only where the original decree is enrolled. If not enrolled, the remedy is a rehearing. *Ib.*

33. If the decree be not enrolled, a bill in the nature of a bill of review, and not strictly a bill of review, for newly discovered evidence, lies. *Ib.*

34. The granting of a bill of review for newly discovered evidence is matter of discretion, and must be brought forward by petition to the court. *Ib.*

35. Such a petition must describe the new evidence distinctly and specifically, and when discovered, and its bearing on the decree. *Ib.*

36. It is not sufficient to state that the petitioner expects to prove certain facts. He must state the exact evidence to establish them. *Ib.*

37. On the hearing of such a petition, affidavits may be

admitted on each side, if necessary to explain the nature of the evidence. *Ib.*

38. (May, 1845.) A bill in the nature of a bill of review lies only after a final decree, and not upon an interlocutory decree. *Jenkins v. Eldredge*, 3 Story, 299.

39. (May, 1859.) Circuit Courts have no jurisdiction to review the judgments or decrees of the Supreme Court; and a Circuit Court for one circuit is equally destitute of authority to review a judgment or decree of a Circuit Court in another circuit; but, *semble*, a judgment or decree of the Supreme Court, affirming a judgment or decree of a Circuit Court, may be reviewed in a Circuit Court, upon proof that both judgments or decrees were obtained by fraud. *Clark v. Hackett*, 1 Cliff. 269.

40. (June, 1879.) In a suit on a patent, after an interlocutory decree in favor of the plaintiff, the defendant applied to the court for leave to file a bill to review the proceedings and the decree, and to amend the answer by setting up two French patents against the novelty of the plaintiff's patent, on the ground that, if the French patents had been in evidence, the decision would have been different. The application set forth, (1) that the defendant was ignorant of the existence of the French patents until after the proofs were closed; (2) that he did not know of their relevancy and materiality until after the decree was made and after he had employed new counsel; (3) that the defendant's ignorance, and the insufficiency of a prior application, made after the proofs were taken and before the hearing, to admit said patents in evidence, was solely due to the inexperience and lack of legal knowledge of his former counsel; (4) that, in selecting such counsel, the defendant was mistaken. *Held*, that the excuses offered were not sufficient to warrant the granting of the application, and that it was not clear that the result would have been different if the French patents had been in evidence. *De Florez v. Reynolds*, 16 Blatchf. 397.

41. (Nov., 1879.) R. having sued F., in equity, for the infringement of a patent, F., in writing, admitted R.'s right, and agreed on the damages to be paid, and to consent to a decree therefor and for a perpetual injunction. Such consent was given and the decree was entered, the damages were paid, and the injunction was issued. Many terms of court having elapsed since the entry of the decree, F. applied for leave to file a supple-

mental bill, to set aside the decree, on the ground that the agreement was entered into under a mistake of fact. *Held*, —

(1.) That the application was really to file a bill of review, and was too late, under Rule 88 in equity.

(2.) That, the decree having been entered by consent, a bill of review to set it aside could not be entertained.

(3.) That the agreement operated as an estoppel. *In re The Petition of Frederick Pentlarge & William Beeston*, 17 Blatchf. 306.

42. (March, 1871.) A bill of review may be conjoined with a bill for relief against a fraudulent decree. *Campbell v. Railroad Co.*, 1 Woods, 368.

43. (April, 1876.) A bill of review can only be sustained upon the ground of error apparent on the record; and the record consists of the pleadings, proceedings, and decree, and does not include the evidence. *Barker v. Barker's Assignee*, 2 Woods, 241.

44. (June, 1879.) To entitle a party to bring a bill of review, it is necessary that he should have obeyed and performed the decree. *Swan v. Wright's Executors*, 3 Woods, 587.

45. When the complainant, in a bill of review, had leave of the court to file his bill, and had performed all things required by the decree up to the time of filing his bill of review, but had failed to perform matters required by the decree to be performed after the date of filing the bill of review, he was ordered by the court, on motion of the defendant, to perform, by a certain day, those matters as to which he was in default, on penalty of having his bill of review dismissed. *Ib.*

46. It is no sufficient reply to a motion to dismiss a bill of review on the ground that the decree sought to be reversed has not been performed, to say that there is ample security for the performance of the decree. The defendant in the bill of review is entitled to the absolute performance of the decree. *Ib.*

47. (July, 1842.) The ordinances of Lord Bacon still govern bills of review. They may be filed for errors of law, and for new matter or proof material in the case, of which the party, at the hearing, had no knowledge. *Massie's Heirs v. Graham's Adm'rs*, 3 McLean, 41.

48. If the new matter would have changed the decree, though foreign to the issue, it is ground for a review. *Ib.*

49. The mode of filing a bill of review is, by petition setting forth the grounds, and asking leave to file the bill. *Ib.*

50. As the practice is new in this court, the bill being filed in the present case, considered as a petition for leave, &c. *Ib.*

51. In England, before the enrollment of a decree, a bill of review will not lie. *Ib.*

52. To authorize a review, the evidence must not only be newly discovered, but it must appear that by the use of reasonable diligence it could not have been discovered. *Ib.*

53. A miscalculation in the amount of the decree, by which the defendant is charged with a larger sum than he should be, may be corrected, and the ground of review obviated by entering a credit for the amount, on the unsatisfied decree. *Ib.*

54. It is not necessary in all cases to comply with a decree before it can be reviewed; as, for instance, the execution of a conveyance. *Ib.*

55. Application for leave must present a *prima facie* case for a review. On the hearing the same grounds may be considered. *Ib.*

56. Lapse of time will bar a review; especially where the death of persons interested in the transactions leaves no probability of explanation. *Ib.*

57. The granting of a bill of review is not a matter of right. *Ib.*

58. (June, 1846.) A bill of review will lie for errors in law, or on the ground of newly discovered evidence. *Ross v. Prentiss*, 4 McLean, 106.

59. On the latter ground, the bill is filed by leave of the court. On the former, it is filed without leave. *Ib.*

60. (April, 1856.) Where, on bill of foreclosure by the holder of two notes secured by mortgage, neither the bill nor decree accounted nor provided for the third note, a bill of review will lie by the defendants, even though the decree has not been executed. *Phillips v. Mariner*, 5 Biss. 26.

61. (1870.) A bill of review should state the former proceedings, and wherein the party exhibiting it considers himself aggrieved: the sufficiency of allegations in this respect considered and decided. *Kellom v. Easley*, 1 Dill. 281.

Rule 89.—Circuit Courts may make further Rules.

The Circuit Courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings,

and process, *mesne* and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

Rule 90. — Practice, how regulated.

In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

1. (April, 1818.) The practice in the courts of Pennsylvania, for the jury to find a special verdict in a cause where the parties have not legal, but have equitable claims, does not apply in the Circuit Court of the United States, that court having equity powers. *Conn v. Penn*, 1 Pet. 497.

2. (Jan., 1828.) The rules which govern the practice of the Circuit Courts in chancery have been prescribed by this court, and ought to be observed. *M'Donald v. Smalley*, 1 Pet. 620.

3. (Jan., 1832.) The acts of Maryland regulating the proceedings on injunctions, and other chancery proceedings, and giving certain effects to them in courts of law, are of no force in relation to the courts of the United States. The chancery jurisdiction given by the Constitution and laws of the United States is the same in all the States of the Union, and the rule of decision is the same in all. In the exercise of that jurisdiction, the courts of the United States are not governed by the state practice; but the act of Congress of 1792, ch. 36, has provided that the modes of proceeding in equity suits shall be according to the principles, rules, and usages which belong to courts of equity, as contradistinguished from courts of law. And the settled doctrine of this court is, that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from courts of law; subject, of course, to the provisions of the acts of Congress, and to such alterations and rules as, in the exercise of the powers

delegated by those acts, the courts of the United States may from time to time prescribe. *Boyle v. Zacharie*, 6 Pet. 648.

4. (Jan., 1833.) Where the new parties to a proceeding in chancery are the legal representatives of an original party, and the proceedings have been revived in their names, by the order of the court, on a bill of revivor, the settled practice is to use all the testimony which might have been used if no abatement had occurred. The representatives take the place of those whom they represent, and the suit proceeds in a new form, unaffected by the change of name. *Vattier v. Hinde*, 7 Pet. 252.

5. The act for regulating processes in the courts of the United States provides that the forms and modes of proceeding in courts of equity, and in those of admiralty and maritime jurisdiction, shall be according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty, respectively, as contradistinguished from courts of common law, subject, however, to alterations by the courts, &c. This act has been generally understood to adopt the principles, rules, and usages of the court of chancery of England. *Ib.*

6. (Jan., 1834.) The twentieth of the rules made by this court at February term, 1822, for the regulation of proceedings in the Circuit Courts, in equity causes, prescribes, "if a plea or demurrer be overruled, no other plea or demurrer shall be thereafter received; and the defendant shall proceed to answer the plaintiff's bill; and if he fail to do so within two calendar months, the same, or so much thereof as was covered by the plea or demurrer, may be taken for confessed, and the matter thereof be decreed accordingly." *Bank of United States v. White*, 8 Pet. 262.

7. By the terms of this rule, no service of any copy of an interlocutory decree, taking the bill *pro confesso*, is necessary, before the final decree; and therefore it cannot be insisted on as a matter of right, or furnish a proper ground for a bill of review. If the Circuit Court should, as matter of favor and discretion, enlarge the time for an answer, or require the service of a copy before the final decree, that may furnish a ground why that court should not proceed to a final decree until such order was complied with. But any omission to comply with it would be a mere irregularity in its practice; and if the court should afterwards proceed to make a final decree without it, this would not

be error for which a bill of review lies; but it would be to be redressed, if at all, by an order to set aside the decree for irregularity, while the court retained possession and power over the decree and the cause. *Ib.*

8. No practice of the Circuit Court, inconsistent with the rules of practice established by this court, for the Circuit Courts, can be admissible to control them. *Ib.*

9. (Jan., 1836.) A party is not allowed to state one case in a bill or answer, and make out a different one by proof; the *allegata* and *probata* must agree; the latter must support the former. *Boone v. Chiles*, 10 Pet. 178.

10. (Jan., 1844.) In the Circuit Court of the United States for Louisiana, where a party seeks relief which is mainly appropriate to a chancery jurisdiction, chancery practice must be followed. *McCollum v. Eager*, 2 How. 61.

11. (Jan., 1847.) By the laws of Louisiana, where there has been a judicial sale of the succession, by a probate judge, a creditor of the estate who obtains a judgment cannot levy an execution upon the property so transferred, upon the ground that the sale was fraudulent and void. He should first bring an action to set the sale aside. *Ford v. Douglas*, 5 How. 143.

12. The purchaser under the judicial sale having filed a bill and obtained an injunction upon the creditor to stay the execution, it was an irregular mode of raising the question of fraud for the creditor to file an answer setting it forth, and alleging the sale to be void upon that ground. He should have filed a cross-bill. Exceptions to the answer, upon this account, were properly sustained by the court below. *Ib.*

13. But if the court below should perpetuate the injunction, upon the defendant's refusal to answer further, the injunction should be free from doubt, in leaving the creditor to pursue other property under his judgment, and also at liberty to file a cross-bill. If the injunction does not clearly reserve these rights to the creditor, it goes too far, and the judgment of the court below must be reversed. *Ib.*

14. (Oct., 1875.) As this cause is in equity, the act of 1872 (17 Stat. 197; Rev. Stat. s. 914) has no application to it. *Blease v. Garlington*, 2 Otto, 1.

15. (Oct., 1878.) The provisions authorizing process to be served without the limits of the district where the suit might be

brought, and parties and subjects of controversy to be united, which, in an ordinary chancery suit, would render a bill multifarious, are regulations of practice and procedure which are subject to legislative control. *United States v. Union Pacific Railroad Co.*, 8 Otto, 569.

16. (May, 1847.) Rules of the court may be waived or modified for good reasons. *Russell v. McLellan*, 3 Woodb. & M. 157.

17. (Nov., 1864.) The equity practice of the federal courts, when not controlled by an act of Congress or the rules prescribed by the Supreme Court, is in general regulated by the chancery practice of the parent country, as it existed prior to the adoption of what are called the "New Rules." *Goodyear v. Providence Rubber Co.*, 2 Cliff. 351.

18. (Oct., 1872.) The court will not so far take notice of an alleged parol agreement of counsel, made out of court, as to undertake, where there is a conflict of opinion between the respective counsel, as to the terms of the agreement, or a difference of recollection as to its existence or meaning, to decide the question of accuracy of recollection or construction. *American Saddle Co. v. Hogg*, 1 Holmes, 177.

19. (March, 1832.) The Supreme Court of the United States has, under authority of an act of Congress, adopted certain rules of practice for the courts of equity of the United States; one of which is, that in all cases where the rules prescribed by the Supreme Court, or by the Circuit Court, do not apply, the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England. *Pomeroy v. Manin*, 2 Paine, 476.

20. (July, 1869.) [Petition by an assignee in bankruptcy praying for an injunction to restrain the foreclosure of an alleged fraudulent mortgage upon property of the bankrupt.] *Held*, that the proceeding by the assignee should have been by a formal bill in equity. *Matter of Kerosene Oil Co.*, 6 Blatchf. 521.

21. The petition of J. was directed to be amended, and to be filed as a bill in equity, and G. was ordered, on service of a copy of it on his attorney, to plead to or answer it, according to the rules and practice of the court, and proceedings in the foreclosure suit were stayed. *Ib.*

22. (Dec., 1869.) The addition, as plaintiffs, of D., as trustee for the corporations, and of the corporations themselves, is sur-

plusage ; but where the objection to such addition was not raised until the hearing, and R. had, after the filing of the bill, assigned to D., as trustee for the corporations and for R., all claims for past infringements of the patent, the bill was allowed to stand. *Dibble v. Augur*, 7 Blatchf. 87.

23. (Oct., 1818.) If the bill alleges a particular fact, the plaintiff cannot, in argument, urge that the fact is otherwise. He is bound by his admission, unless, before the hearing, he obtains leave to amend. *Prevost v. Gratz*, 3 Wash. 434.

24. (April, 1823.) The equity practice and mode of proceeding was fixed by the act of 1792, subject only to be changed by rules of those courts, or of the Supreme Court, and cannot be affected by state laws, either prior or subsequent to the act of 1792. *Mayer v. Foulkrod*, 4 Wash. 349.

25. (April, 1871.) If, in a case in equity, any circumstances exist which render it improper or inequitable to carry on proceedings in the court, they can always be brought to the notice of the court by motion or petition in the suit, or may be pleaded in bar or abatement. A formal bill for the purpose is needless litigation. *Fuentes v. Gaines*, 1 Woods, 112.

26. (June, 1875.) When junior mortgagees have first brought their suit to foreclose, and the court has taken possession of the mortgaged property by a receiver, the senior mortgagees cannot gain possession of the property by a suit subsequently begun, until the first is ended. *Young v. Railroad Co.*, 2 Woods, 607.

27. (April, 1857.) The equity rules adopted by the Supreme Court, under the authority of an act of Congress, are, of course, obligatory on the Circuit Courts. The latter have not the authority to rescind a rule adopted by the Supreme Court for the government of their practice in chancery. *Jenkins v. Greenwald*, 1 Bond, 127.

28. (Dec., 1872.) Because of the constitutional provision [s. 2, art. 3], neither Congress nor the courts can do away the distinction between law and equity, nor the forms used, nor the causes and reasons which distinguish the one from the other. *Butler v. Young*, 1 Flipp. 276.

29. (June, 1845.) A want of an averment of citizenship, if not made in a bill or declaration, or where it is falsely alleged, should be taken advantage of by pleading. *Hilliard v. Brevoort*, 4 McLean, 24.

30. (June, 1851.) A statute of a state which regulates the

procedure on a bill of foreclosure does not apply to the courts of the United States. *Dow v. Chamberlin*, 5 McLean, 281.

31. They do not derive their chancery jurisdiction or their rules of practice from state authority. *Ib.*

32. (Sept., 1873.) The Wisconsin Code has not changed the pleadings in equity cases. *Burpee v. First National Bank*, 5 Biss. 405.

33. (April, 1868.) The federal court, in determining whether a bill is original and independent, or ancillary and auxiliary to a matter already before the court, does not confine itself to the line which, in chancery pleadings, divides original from cross and supplemental bills, but looks to the essence of the matter, and to principles adopted by it with reference to the question of its jurisdiction of the parties. *Schenck v. Peay & Bliss*, Woolw. 176.

34. (Jan., 1859.) The practice and jurisdiction of this court, as a court of equity, cannot be controlled by the practice of the state courts. *United States v. Parrott*, McAll. 447.

35. (Jan., 1868.) It need not be stated in a pleading that an alleged trust concerning lands was created by writing, and it will be presumed to have been so created until the contrary appears. The Statute of Frauds, which requires such trusts to be created or evidenced by writing, is a rule of evidence, but not of pleading. *Lamb v. Starr*, Deady, 350.

Rule 91. — Oath, or Affirmation.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

Rule 92. — Decree for Balance, after Foreclosure Sale.

DECEMBER TERM, 1863.

Ordered, That in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

Rule 93. — Injunctions.

OCTOBER TERM, 1878.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

**Rule 94. — Bill by Stockholders against Corporation, &c.
Verification. Averments.**

OCTOBER TERM, 1881.

Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

Provisions relating to Equity Practice.

The following provisions relating to equity practice are to be found in the act of 1st of June, 1872:—

SEC. 7. That whenever notice is given of a motion for an injunction, out of a Circuit or District Court of the United States, the court or judge thereof may, if there appear to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion. Such order may be granted with or without security, in the discretion of the court or judge: *Provided*, That no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order except within the circuit to which he is

allotted, and in causes pending in the circuit to which he is allotted, or in such causes at such place outside of the circuit as the parties may in writing stipulate, except in causes where such application cannot be heard by the circuit judge of the circuit, or the district judge of the district.

SEC. 13. That when in any suit in equity, commenced in any court of the United States, to enforce any legal or equitable lien or claim against real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day therein to be designated, which order shall be served on such absent defendant, if practicable, wherever found; or where such personal service is not practicable, such order shall be published in such manner as the court shall direct; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only.

[17 *Stat. at Large*, pp. 197, 198; *Rev. Stat.*, ss. 718, 719, 738.]

EQUITY PRACTICE. MISCELLANEOUS.

Affidavit.

1. (Sept., 1871.) In a suit in equity, it is irregular to swear a person to an affidavit entitled in the suit, before the bill has been filed. *Baldwin v. Schultz*, 9 Blatchf. 495.

Appeal Bond. Supersedeas.

1. (Jan., 1844.) An appeal bond given to the people or to the relator is good, and, if forfeited, may be sued upon by either. *Spalding v. People of State of New York*, 2 How. 66.

2. (Sept., 1875.) Penalty of bond for appeal fixed, under Rule 32 of the Supreme Court. *Wilmer v. Railway Co.*, 2 Woods, 447.

3. (June, 1879.) Penalty of appeal bond in this case fixed at \$100,000, and reasons given therefor. *Duncan & Elliot v. Railroad Co.*, 3 Woods, 597.

4. (Oct., 1868.) The affidavit of the surety on an appeal bond, as to his responsibility, where he does not personally appear, is not sufficient; there must be independent evidence of his responsibility. *Hobson v. Johnson*, 4 Biss. 505.

5. (April, 1865.) If the unsuccessful party to a decree does not give a *supersedeas* bond, he cannot complain if the decree be enforced, notwithstanding any injury to which he may be thereby subjected. *Souter v. La Crosse Railroad*, Woolw. 80.

6. (1877.) The pendency of an appeal from a final decree in equity, in which no *supersedeas* exists, does not deprive the court which rendered the decree from making proper orders to enable the party in whose favor the decree was rendered to have the same executed. *Farmers' Loan and Trust Co. v. Central Railroad*, 4 Dill. 546.

Auditors.

1. (Feb., 1810.) The report of auditors appointed by consent of parties, in a suit in equity, is not in the nature of an award by arbitrators, but may be set aside by the court, although neither fraud, corruption, partiality, or gross misconduct on the part of the auditors be proved. *Field v. Holland*, 6 Cranch, 8.

2. Without expressly revoking an order of reference to auditors, the court may direct an issue to be tried. *Ib.*

3. A court of equity may ascertain the facts themselves, if the evidence enables them to do it, or may refer the question to a jury, or to auditors. *Ib.*

Award of Arbitrators.

1. (Feb., 1826.) An award must decide the whole matter submitted to the arbitrators; it must not extend to any matter not comprehended in the submission; and it must be certain, final, and conclusive of the whole matter referred. *Carnochan v. Christie*, 11 Wheat. 446.

2. Where the arbitrators determined that the plaintiffs should

be entitled to a credit of a certain sum on account of sales of land to the defendant, provided "they shall grant, or cause to be granted, to the said W. C. (the defendant) a clear, unincumbered, and satisfactory title" to the lands, without limiting any time within which the title should be made, — *Held*, that the award was void, as not being final and conclusive. *Ib.*

3. A court of equity either enforces an award as it is made, or sets it aside, if in any respect defective; but it is contrary to its practice to confirm the award so far as it extends, and to supply omissions by decree of the court. *Ib.*

Collusion.

1. (Aug., 1873.) Where, by collusion between the nominal parties to the record, a suit had been prosecuted to final judgment in the state court pending proceedings in this court, this court will not allow the proceedings here to be dismissed against the wish of the real party in interest. *Nusbaum v. Emery*, 5 Biss. 393.

2. The fact that the defendant in the state court did not plead the pendency of the suit in this court, is evidence of collusion between the parties. *Ib.*

Commission of Rebellion.

1. (May, 1801.) The court will, under circumstances, order a commission of rebellion to be returnable *immediate*; but will set down the cause for a hearing at the same time, and direct the bill to be taken *pro confesso*. *Boudinot v. Symmes*, Wall. C. C. 139.¹

Contempt of Court.

1. (Oct., 1846.) Where a plaintiff, who had obtained an injunction from this court restraining a defendant from the infringement of a patent, set on foot a stratagem to lead the defendant to violate the injunction, and immediately made a motion for an attachment, knowing the defendant to be innocent of any wrongful act, and it clearly appeared that there had been no violation of the injunction, — *Held*, that the plaintiff must pay the costs of the motion. *Sparkman v. Higgins*, 2 Blatchf. 29.

¹ Second edition.

2. Even if there had been an actual violation of the injunction induced by the stratagem of the plaintiff, an application for an attachment would not, *it seems*, be justified, either in conscience or in law. *Ib.*

3. (Feb., 1848.) A plaintiff, in moving for an attachment against a defendant, for contempt of court in not obeying an injunction, must state, in the proofs on which the application is founded, the specific acts of omission or commission which constitute the alleged contempt. *Parkhurst v. Kinsman*, 2 Blatchf. 76.

4. When, in such a proceeding, the defendant is ordered to answer interrogatories to be filed, such interrogatories must be limited to the particular offenses so alleged, and must not inquire in regard to matters not charged specifically in such proofs. *Ib.*

5. Nor can the plaintiff require the defendant to answer interrogatories as to particulars which are charged on information and belief, and are not established by direct evidence. *Ib.*

6. Interrogatories which were unauthorized, having been demurred to by the defendant, and he having answered, taking issue upon others, — *Held*, that he was entitled to recover his costs on the demurrer; but the enforcement of the costs was stayed until the issues on the interrogatories answered should be disposed of. *Ib.*

7. *Held*, also, that the proper mode of proof on such issues was by testimony taken orally before a master. *Ib.*

8. (July, 1856.) Where an order granting an injunction was made and the writ of injunction issued thereon was not tested till more than six weeks afterwards, and was not served till within seven days of one year after the date of its teste, — *Held*, that a disobedience of the writ would not be punished by attachment. *McCormick v. Jerome*, 3 Blatchf. 486.

9. After such a lapse of time, the plaintiff should, before using the writ, apply to the court for authority to do so. *Ib.*

10. (April, 1857.) *Semble*, that, in order to attach for the breach of an injunction restraining the infringement of a patent, the party to be proceeded against must be a party to the suit, and have had notice of the application for the injunction. *Sickels v. Borden*, 4 Blatchf. 14.

11. If an injunction is made broader in its scope than was intended by the order under which it was issued, the defendant should, on being served with it, take immediate measures to set

it aside for that reason, and not wait to raise the objection until the hearing of a motion for an attachment for a violation of the injunction. *Ib.*

12. (Aug., 1858.) Where, on a motion for an attachment for the violation of an injunction, the question as to whether the writ was, or was not, served on the defendant, is left in doubt, the motion will be denied. *Whipple v. Hutchinson*, 4 Blatchf. 190.

13. On a motion for an attachment for the violation of an injunction to restrain the infringement of letters-patent, affidavits to show that the patentee was not the first and original inventor of the thing patented are immaterial and irrelevant. *Ib.*

14. Such affidavits are immaterial and irrelevant, also, where the defendant is constructing the patented article by agreement, under the patent. *Ib.*

15. (Oct., 1865.) Where an injunction restraining the infringement of a patent was issued on a final decree, in a suit in equity, and a motion was afterwards made for an attachment against the defendant, for violating the injunction by selling an article alleged to be an infringement of the patent, and it appeared that no such article had been sold by the defendant prior to the making of the decree, and it did not appear that such an article existed before the making of the decree, and an issue was fairly raised, on the facts, as to whether such article was an infringement of the patent, — *Held*, that such issue could not be disposed of on a motion, on affidavits, but must be determined in a suit brought for the purpose. *Liddle v. Cory*, 7 Blatchf. 1.

16. *Held*, also, that the case was not a proper one in which to direct proofs to be taken before a master. *Ib.*

17. (July, 1871.) This court has power to compel, by summary process, the restoration of any property abstracted from its custody, whether the party abstracting it be or be not a party to the suit concerning such property. *Erie Railway Co. v. Heath*, 8 Blatchf. 536.

18. Shares of the stock of a corporation were in the hands of a receiver of this court. Certificates therefor were issued by the corporation to the receiver, and had, appurtenant to them, the privilege of being certified by the registering agent of the corporation, as representing shares duly registered. Such privilege was a part of the property in the shares, and a valuable privilege. G., by his acts in respect to such shares, deprived such shares,

while they were in the custody of this court, of such privilege, and procured such privilege to be conferred on a like number of other shares of the stock of the corporation, while they were his property. *Held*, that G. must restore the property abstracted, by making provision for the restoration of such privilege to the receiver's shares, or, in default thereof, make good the pecuniary value of the spoliation. *Ib.*

19. (May, 1871.) There is no doubt of the power of the court, as a court of equity, to award attachments for contempt in vacation. As an equitable tribunal, the court is always open. *Vose v. Reed*, 1 Woods, 647.

20. Where parties have been guilty of a technical contempt, in violating an injunction, but declare on oath that they were not aware of the violation, and submit to the discretion of the court, they will be allowed to purge the contempt by undoing or reversing their acts, when it is practicable to do so. *Ib.*

21. (Dec., 1874.) Where a bill was filed, the prayer of which was that this court would construe a deed of trust executed by a railroad company, and compel the trustees to execute the trust, or appoint a receiver to take possession of and administer the trust property, and service of subpœna had been made on the railroad company, which was the principal defendant, and a restraining order had been allowed, and also served on the railroad company, enjoining it from delivering possession of the trust property to any one except a receiver appointed by this court in the case thus commenced,—*Held*, that by these proceedings the court acquired constructive possession of the trust property, and that possession thereof, taken under color of process from another court, in a suit commenced after the proceedings above mentioned, was in contempt of the process and jurisdiction of this court, even though the other court first obtained actual possession of the property. (Per WOODS, Circuit Judge.) *Wilmer v. Railway Co.*, 2 Woods, 410.

22. *Contra*. Service of process gives jurisdiction over the person; seizure gives jurisdiction over the property, and, until the property is seized, no matter when the suit was commenced, the court does not have jurisdiction over it. Thus, when two suits between different parties, raising different controversies, and having different purposes in view, are commenced in courts of co-ordinate jurisdiction, and the possession of the property, which

is the subject of the suit, is necessary to the relief asked in each case, that court which first seizes the property acquires jurisdiction over it, to the exclusion of the other, no matter when the suits were commenced or process *in personam* was served. (Per BRADLEY, Circuit Justice.) *Ib.*

23. (May, 1875.) Where the trustees of the internal improvement fund of Florida were restrained, by the order of the court, from selling or disposing of any lands belonging to their trust, except in strict accordance with the act of the legislature prescribing their duties, and the exercise of judgment and discretion were required on the part of the trustees as to the true construction of their powers and duties under the act, and they answered, under oath, that they had done no act which they believed or supposed was in violation of any direction of the court, but had in good faith tried to obey the decree of the court, a motion to attach them, as for a contempt for disobedience of the decree of the court, was overruled. *Vose v. The Trustees, &c.*, 2 Woods, 647.

24. (Oct., 1865.) Whether a defendant, who has been enjoined from infringing a patent by manufacturing or selling the infringing article, continues to sell in his own right, or as the agent of another, he is equally guilty of contempt, and is liable to attachment. *Potter v. Muller*, 1 Bond, 601.

25. (July, 1839.) A rule to show cause why an attachment should not issue for breach of an injunction is not the mode of proceeding in this court. *Worcester v. Truman & Smith*, 1 McLean, 483.

26. A motion should be made that the defendant stand committed for a breach of the injunction, and this motion is made on notice being given to the defendant. *Ib.*

27. No notice having been given in this case, the court overruled the motion for an attachment. *Ib.*

28. (April, 1868.) The established practice in this court, when affidavits are filed charging any person with disobedience of the orders or process of the court, is to enter a rule on him to show cause why an attachment should not issue. *Fanshawe v. Tracy*, 4 Biss. 490.

29. Such a practice is not in conflict with Rule 90 in equity, but comes within the exception in that rule. *Ib.*

30. It is, however, competent for the court, in its discretion, to

issue an attachment in the first instance, and without any rule to show cause. *Ib.*

31. The filing of a supplemental bill, for the purpose of bringing some of the defendants into contempt, is not a waiver of the rule *nisi* previously entered. *Ib.*

32. The court will, at any time, give the party alleged to be in contempt full opportunities to be heard. *Ib.*

33. (July, 1877.) Property held in trust by the court, for the purpose of protecting it pending foreclosure, and over which a receiver has been appointed, is in the possession of the court, and any interference with it is punishable as a contempt. *Secor v. Railway Co.*, 7 Biss. 513.

34. Where a railroad is in the hands of a receiver, and the employees of another road who have struck, or any other persons, prevent the employees of the receiver from working, they commit a contempt of court, and are to be treated in as summary a manner as if the contempt were committed in the actual presence of the court. *Ib.*

35. (Aug., 1877.) A receiver being an officer of the court, whose duty it is to protect the property and operate the road under the direction and order of the court, the property thus placed in his possession is considered as property belonging to the court, and entitled to its protection. *King v. Railway Co.*, 7 Biss. 529.

36. In proceedings for a contempt, the court can proceed in a summary manner, and the accused is not, of right, entitled to a trial by jury. *Ib.*

37. Where the offense is clearly proved, the court will proceed summarily to punish the offender. *Ib.*

Costs.

1. (Oct., 1843.) Where a demurrer might be put in to a bill in equity, but, instead thereof, an answer is made, and the bill is dismissed on its merits, because the plaintiff does not show a sufficient title, the defendants are not entitled to costs. *Brooks v. Byam*, 2 Story, 553.

2. Costs in equity are in the sound discretion of the court; but in the ordinary course of practice, when a bill is dismissed, costs are not awarded to the plaintiff. *Ib.*

3. Under the circumstances of this case, it was *held* that each party must bear his own costs ; but that the expense of printing the record must be divided between them. *Ib.*

4. (Oct., 1846.) Costs in equity go, *prima facie*, to the prevailing party ; and it is desirable to depart as little as possible from the rules at law on the subject. *Hunter v. Town of Marlboro'*, 2 Woodb. & M. 169.

5. They will be departed from, however, in strong cases, — where costs are not equitable, the party not prevailing on the merits, or on an important point, or on what was known or ought to have been known to the opposite party. *Ib.*

6. (April, 1856.) Under the act of Feb. 26, 1853 (10 Stat. at Large, 162), the item of \$2.50 allowed as costs to a solicitor for each deposition taken and admitted as evidence in a cause is not taxable in an equity suit, except for the deposition when admitted on a final hearing. *Stimpson v. Brooks*, 3 Blatchf. 456.

7. The distinction between an *affidavit* and a *deposition* considered. *Ib.*

8. (Aug., 1858.) Where the injunction has been violated, and the defendant is protected from the consequences only by a defect in the service of the writ, no costs will be allowed to him, on a denial of a motion for an attachment for such violation. *Whipple v. Hutchinson*, 4 Blatchf. 191.

9. (Sept., 1867.) Where a defendant, in a suit in equity, was held to have infringed one claim of a patent, and another claim of the patent was held not to have been new, no costs were allowed to either party. *Yale & Greenleaf Manufacturing Co. v. North*, 5 Blatchf. 455.

10. (June, 1874.) The act of Feb. 26, 1853 (10 Stat. at Large, 167), in regard to the fees of witnesses, prescribes, as fees of witnesses, "for each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents per mile for traveling from his place of residence to said place of trial or hearing, and five cents per mile for returning." *Held*, that the fees of necessary witnesses, who reside within less than one hundred miles of the place of examination, in a suit in equity, and whose attendance and examination are procured in good faith by the party on whose behalf they are examined before an examiner, can, under said act, be taxed and allowed against the adverse party, even though it be not shown that

they were served with a writ of subpœna to attend. *Dennis v. Eddy*, 12 Blatchf. 195.

11. The cost of printing papers which, by a rule of court, a party is required to have printed, can be taxed against the adverse party. *Ib.*

12. (July, 1878.) Costs awarded to the plaintiff, except the costs of the reference, and report, and exceptions, and the hearing thereon. *Garretson v. Clark*, 15 Blatchf. 70.

13. (July, 1879.) No costs allowed, on dismissing a bill and a cross-bill. *Prime v. Brandon Mfg. Co.*, 16 Blatchf. 453.

Disclaimer.

1. (May, 1871.) Where the owner of the entire right under the patent, for the territory where the infringements had taken place, had not joined in the disclaimer, and there was no evidence that he had unreasonably neglected to disclaim, and no such defense was set up, he was allowed to make such disclaimer, after final hearing. *Myers v. Frame*, 8 Blatchf. 446.

2. (Sept., 1879.) The second claim is void for want of novelty. The plaintiff was allowed to recover on the first claim, on making, before a decree, a disclaimer as to the second claim, it not appearing that there had been any unreasonable neglect or delay to enter such disclaimer; but, as the disclaimer was not made before the suit was brought, costs to the plaintiff were refused. *Christman v. Rumsey*, 17 Blatchf. 149.

Dismissing Bill.

1. (Dec., 1856.) According to the practice prescribed for the Circuit Courts, by this court, in equity causes, a bill cannot be dismissed, on motion of the respondents, for want of equity, after answer and before hearing. *Betts v. Lewis*, 19 How. 72.

2. (Dec., 1857.) A motion to dismiss the complainant's bill, upon the ground that he had parted with his interest, was properly overruled; because such assignment was not made until after the time when the computation of profits ended. *Dean v. Mason*, 20 How. 198.

3. (Sept., 1825.) Where a party dies during term, the judgment may be entered in this court as of a day antecedent to his death. *Griswold v. Hill*, 1 Paine, 483.

4. But there is this difference, in this respect, between its equity proceedings and those of the English court of chancery, that this court is open only during term, and a decree cannot be entered if the death occurred before the beginning of the term. *Ib.*

5. Where an order for the dismissal of a bill was taken *ex parte*, the complainant having avowed his intention not to pursue the cause any further, on a motion to vacate the order, on the ground that the defendant died before it was entered, — *Held*, that it was not distinguishable in principle from the case of death after argument, but before judgment, and that the order might be entered antecedent to the death. *Ib.*

6. (July, 1862.) Where a certificate of a division of opinion on the question of the jurisdiction of this court to entertain a bill in equity, sent from this court to the Supreme Court, is dismissed by that court because of an equal division of opinion in that court, and the mandate to this court directs it to proceed in the cause in conformity to law and the rules and proceedings in such cases provided, it becomes the duty of this court to enter a decree dismissing the bill. *Coleman v. Hudson River Bridge Co.*, 5 Blatchf. 56.

7. (Oct., 1816.) Where the original bill contains no allegations against defendants, who have nevertheless answered the bill, they having been made parties by permission given by the court to the complainant, but who did not file an amended bill, if even a proper case for the interference of a court of equity were made out, the court would be compelled to dismiss the bill as against these defendants. *Andrews v. Solomon*, Pet. C. C. 356.

8. (April, 1830.) The court will not dismiss a bill for want of proceeding in the cause for three terms, without giving one term's notice of the application for dismissal. *Delaney v. Hermann*, Baldw. 132.

9. (June, 1874.) A bill will be dismissed as to a subsequent mortgagee to the mortgage in suit, he having been made a party to the litigation, and it being found that that hindered or defeated the suit. *Richards v. Chesapeake & Ohio Railroad Co.*, 1 Hughes, 29.

10. (Jan., 1871.) In the United States equity courts, a bill will not be dismissed for want of equity, except on the final hearing, unless the objection be taken by demurrer. *La Vega v. Lapsley*, 1 Woods, 428.

11. (April, 1871.) In such a case [where the complainants and a part of the defendants are citizens of the same state], the citizenship of the parties being disclosed by the bill, and no objection to the jurisdiction being made *in limine*, complainants may dismiss their bill as to the obnoxious defendants, and hold it as to the others. *Lockhart v. Horn*, 1 Woods, 628.

12. (May, 1871.) When it properly appears by the record that there is a party over whom the court has no jurisdiction, and who is not a necessary party to the proceedings, the bill will be dismissed as to that party, and retained as to the others. *Vose v. Reed*, 1 Woods, 647.

13. (May, 1872.) If, after objection is made to a bill in equity for want of necessary parties, the complainant neglects or refuses to bring them before the court, the bill will be dismissed. *Jones v. Brittan*, 1 Woods, 667.

14. (June, 1877.) When a bill is dismissed without prejudice, the complainant is not barred from bringing a new bill against other parties on the same claim, or against the same parties on new or additional facts. *Kimbal & Slaughter v. County of Mobile*, 3 Woods, 555.

15. (Nov., 1873.) Where a bill must be dismissed for want of equity, jurisdiction will not be retained to settle the priorities or equities between the defendants. *Smith v. Little*, 5 Biss. 490.

District Judge sitting in Circuit Court.

1. (June, 1876.) A district judge sitting in the Circuit Court may, in a proper case, enlarge the time for filing an appeal in the Circuit Court. *Morris v. Brush's Executors*, 2 Woods, 354.

Exhibits.

1. (Oct., 1845.) A deed or other documentary exhibit may be put in after the evidence is published. *Nesmith v. Calvert*, 1 Woodb. & M. 34.

2. (May, 1868.) In this case, the court ordered the originals of printed exhibits, on file as parts of a deposition, to be taken from the files for the purpose of being annexed to a commission, on condition that photographic *fac-similes* thereof should first be

made and placed on file, in lieu of the originals, under the direction of the clerk. *Daly v. Maguire*, 6 Blatchf. 137.

3. (July, 1869.) There is no rule in equity pleading requiring that either writings mentioned in a bill, or copies of them, shall be filed, as exhibits, with the bill. *Putnam v. City of New Albany*, 4 Biss. 365.

Fees of Examiner.

1. (Feb., 1878.) In a suit in equity, the proofs taken on the part of the defendant were not filed, because the examiner's fees had not been paid. The plaintiff moved for an order that such proofs be filed, and that an attachment issue against the defendant to compel payment of such fees. *Held*, that the motion must be denied. *Frese v. Biedenfeld*, 14 Blatchf. 402.

Feigned Issue.

ACT OF FEB. 16, 1875.

SEC. 2. That said courts, when sitting in equity for the trial of patent causes, may impanel a jury of not less than five nor more than twelve persons, subject to such general rules in the premises as may, from time to time, be made by the Supreme Court, and submit to them such questions of fact arising in such cause as such Circuit Court shall deem expedient;

And the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings. [*Supplement to Rev. Stat.*, page 136.]

1. (Feb., 1810.) The practice in Kentucky, to call a jury to ascertain the facts in chancery causes, is incorrect. *Massie v. Watts*, 6 Cranch, 148.

2. (Oct., 1879.) The verdict upon an issue which a court of chancery directs to be tried at law is merely advisory. A motion for a new trial can be made only to that court; and the party submitting it must procure, for the use of the Chancellor, notes of the proceedings at the trial, and of the evidence there given. *Watt v. Starke*, 11 Otto, 247.

3. These rules are not affected by the second section of the act of Feb. 16, 1875 (18 Stat. part 3, p. 315), which provides that in

a patent case the Circuit Court, when sitting in equity, may impanel a jury and submit to them such questions of fact as it may deem expedient. *Ib.*

4. (Oct., 1846.) Rules as to awarding a feigned issue. *Van Hook v. Pendleton*, 1 Blatchf. 188.

5. (June, 1850.) An action at law, for the infringement of a patent, was tried, and a verdict found for the plaintiff; and a motion for a new trial, on the grounds of errors in law at the trial, and of surprise in the exclusion of evidence, and of newly discovered evidence, was made and denied. After the verdict, the plaintiff filed a bill against the defendants, for a perpetual injunction, founded on the verdict. An answer was put in, setting up in defense the matters urged as grounds for a new trial. After the refusal of a new trial in the action at law, and after replication in the suit in equity, the defendants moved in the latter suit for a feigned issue, on the ground that they had just discovered new evidence which went to show a want of novelty in the plaintiff's invention, and was of a different character from any before presented. *Held*, that it was a proper case for a feigned issue. *Foot v. Silsby*, 1 Blatchf. 545.

6. (June, 1861.) A court of equity is not bound to send to a jury the question whether a reissued patent is for the same invention as the original patent, or whether it covers more ground than the actual invention. *Poppenhusen v. Falke*, 4 Blatchf. 493.

7. If such question is involved in considerable doubt, that may be a reason why it should be sent to a jury. *Ib.*

8. Reasons stated why it would not be proper to send such question, in this case, to a jury. *Ib.*

9. (Oct., 1820.) Where an issue of *devisavit vel non* is directed out of chancery in England, the practice is for the judge who tried the cause to return with the verdict his notes; and if the Chancellor is dissatisfied, on the ground of the admission of improper evidence, or the rejection of what was proper, or for other reasons, he will direct a new trial. But no exception can be taken at *Nisi Prius* to the opinion of the judge who tried the cause. In the Circuit Courts of the United States, if the court is supposed to have erred in any of these particulars, the proper mode is to move the court, sitting in equity, for a new trial. *Harrison v. Rowan*, 3 Wash. 580.

10. (April, 1820.) The rules which prevail in England rela-

tive to new trials of issues out of chancery are not applicable to the Circuit Courts of the United States, where the same judges that direct, superintend the trial of such issues. Here, the only question can be, Are the judges satisfied with the verdict? *Har-rison v. Rowan*, 4 Wash. 32.

11. WASHINGTON, Justice, stated that the verdict was supported by the evidence, and that *he* was satisfied with it. But this is not enough. The *court* should be satisfied; and the district judge not being satisfied, a new trial ought to be granted. *Ib.*

12. (April, 1849.) Where a feigned issue for trial of a fact is directed by the court, no declaration of any sort is requisite. The case is put on the trial list, and the jury sworn to try the issue in the words of the order of issue itself. *Wilson v. Barnum*, 1 Wall. Jr. 342.

13. (Nov., 1862.) A motion for a new trial of a feigned issue, directed by a court of chancery, must be heard on the merits of such issue singly, and cannot be affected by the equities arising on the bill and answer. *Cohen v. Gratz*, 3 Wall. Jr. 379.

14. A motion for a new trial of such an issue must be disposed of before the cause will be heard on bill and answer. *Ib.*

Hearing on Bill and Answer.

1. (Jan., 1845.) The complainant, if he chooses, may go to the hearing, on bill and answer. *Poultney v. City of Lafayette*, 3 How. 81.

2. (June, 1878.) Where a suit in equity is submitted on bill and answer, the answer must be taken as true; and where it denies the case made by the bill, the bill must be dismissed. *United States v. Scott*, 3 Woods, 334.

Judicial Sale.

1. (Feb., 1821.) In an equity cause, the *res* in litigation may be sold by order of the Circuit Court, and the proceeds invested in stocks, notwithstanding the pendency of an appeal to this court. *Spring v. South Carolina Ins. Co.*, 6 Wheat. 519.

2. (Jan., 1844.) A sale ordered by a court in a case where it had not jurisdiction must be considered as inadvertently done, or

as an unauthorized proceeding ; and, in either branch of the alternative, as a nullity. *Shriver v. Lynn*, 2 Pet. 43.

3. (Jan., 1839.) A decree of foreclosure of a mortgage and of a sale are to be considered as the final decree, in the sense of a court of equity ; and the proceedings on the decree are a mode of enforcing the rights of the creditor, and for the benefit of the debtor. The original decree of foreclosure is final on the merits of the controversy. If a sale is made after such a decree, the defendant not having appealed, as he had a right to do, the rights of the purchaser would not be overthrown or invalidated even by a reversal of the decree. *Whiting v. Bank of United States*, 13 Pet. 6.

4. (Dec., 1852.) Where real estate is in the custody of a receiver, appointed by a court of chancery, a sale of the property under an execution, issued by virtue of a judgment at law, is illegal and void. *Wiswall v. Sampson*, 14 How. 52.

5. The proper modes of proceeding pointed out, to be pursued by any person who claims title to the property, either by mortgage, or judgment, or otherwise. *Id.*

6. (Dec., 1866.) The act of confirming or setting aside a sale made by a commissioner in chancery, involving, as it often does, the exercise of a very delicate judgment and discretion, cannot be regarded as a mere control of the ministerial duties of an officer in the execution of final process.

Hence, under the case of *Bronson v. La Crosse Railroad Co.* (1 Wall. 405), here approved, such an act belonged, under the congressional statutes of July 15, 1862, and 3d March, 1863 (12 Stat. at Large, 576 and 807), to the Circuit Court of Wisconsin, and not to the District Court, even though the sale was made under a decree of foreclosure in the last-named court, rendered before the act of July 15, 1862, and when, therefore, the District Court was possessed of full Circuit Court powers. *Railroad Co. v. Soutter*, 5 Wall. 660.

7. (Dec., 1867.) On an application to a court in equity, to refuse confirmation of a master's sale, and to order a resale, a case where speedy relief may be necessary, the court may properly hear the application, and act on *ex parte* affidavits on both sides, and without waiting to have testimony taken with cross-examinations. *Savery v. Sypher*, 6 Wall. 157.

8. (Oct., 1878.) The trustee, the *cestui que trust*, and the trust

itself being before the court, and it appearing that the holders of a majority of the bonds had, in writing, requested and directed the trustee, if he became the purchaser of the property, to convey it to a new corporation, the court might authorize and direct him to bid at the sale at least the amount of the principal and interest of the first-mortgage bonds, and might provide for a complete execution of the trust. *Sage v. Central Railroad Co.*, 9 Otto, 334.

9. It was not error for the court to require that, if a person other than the trustee became the purchaser at the sale, he should pay at once, in cash, a part of his bid as earnest-money. *Ib.*

Ne Exeat.

1. (April, 1857.) A demand must, in order to be a foundation for a writ of *ne exeat*, be an equitable debt or pecuniary claim, and be certain or capable of being reduced to certainty. *Graham v. Stucken*, 4 Blatchf. 50.

2. Where a bill was filed to set aside a bill of sale of a vessel, on the ground that it was made in execution of a contract void for usury, and for a return of the vessel, or the payment of her value, and an account of her earnings, — *Held*, that the claim was not one on which a writ of *ne exeat* could be issued. *Ib.*

3. (Oct., 1807.) The district judges of the courts of the United States have no authority to issue writs of *ne exeat*. *Gerron v. Boecaline*, 2 Wash. 130.

4. The affidavit upon which this writ [*ne exeat*] will issue should be positive to a debt, or to the belief of the plaintiff, that a certain balance of account was due. *Ib.*

5. The plaintiff was allowed to amend his affidavit; and being sworn at the instance of the defendant, he was permitted to state that a particular item of his claim had not been passed upon by arbitrators, who had examined the accounts between the parties. *Ib.*

Orders.

1. (July, 1879.) Form of an order for a preliminary injunction on a patent in a case where the plaintiff exercises his rights by granting licenses. *Colgate v. The Gold & Stock Telegraph Co.*, 16 Blatchf. 503.

2. (April, 1871.) In equity, orders obtained upon motion may be discharged upon motion, and orders obtained *ex parte* may be thus discharged when they have never been assented to by the other party. *Eslava v. Mazange's Adm'r*, 1 Woods, 624.

3. (June, 1869.) Where an appeal bond to the Supreme Court has been presented and approved, but no formal appeal prayed or allowed, though it was evidently the intention of the parties to appeal, and it was so understood by the court, it is competent for the court subsequently to enter an order *nunc pro tunc* allowing the appeal. *Nicholson v. City of Chicago*, 5 Biss. 89.

Payment into Court.

1. (Aug., 1873.) When money in controversy in a suit is held by a nominal party, solely as trustee for another person not a party to the record, the court, at the instance of the party in interest, may order it to be paid into court. *Nusbaum v. Emery*, 5 Biss. 393.

2. Where the holder of money, being an officer of the government, had ceased to be such during the pendency of the suit, the court should order the money to be paid into court. *Ib.*

3. (Jan., 1877.) When a court of equity obtains control of a fund and the parties entitled to it, it will at once place the money where it will ultimately go. *Thomson v. Bradford*, 7 Biss. 351.

Petition.

1. (July, 1873.) Persons who are not parties to a suit cannot, in general, file a petition therein for a stay of proceedings, or any other cause. The remedy is by original bill. The exceptions noted. *Anderson v. Railroad Co.*, 2 Woods, 628.

2. Persons belonging to a class represented in the suit, such as mortgage creditors, represented by the trustees of the mortgage, are regarded as *quasi* parties, and may be heard on petition or motion. *Ib.*

3. Petition for a stay of proceedings on execution, by persons not parties to the suit, and by other persons who consented to the decree, upon condition that proceedings upon it should be suspended upon certain terms, — which were not complied with, — dismissed. *Ib.*

4. (June, 1877.) It is not according to equity practice to institute, upon a petition filed after final decree, a new train of pleadings. The only purpose to be subserved by such a petition, is to bring the claim of the petitioner to the notice of the court or master. *Lockhart v. Horn*, 3 Woods, 542.

Preference.

1. (Dec., 1875.) A person who has recovered judgment against the receivers of a railroad, for injuries received by him while traveling as a passenger upon the road, is not entitled to payment out of the earnings of the road, or the proceeds of its sale, in preference to the first-mortgage bondholders, unless it is so provided by the order of the court placing the road in the possession of the receivers. *Davenport v. Railroad Co.*, 2 Woods, 519.

Receiver.

1. (Dec., 1859.) Where a levy is made upon goods and chattels, under a *fi. fa.*, the officer may confide them to another, for safe keeping, until there has been a settlement of the judgment and payment of all costs. He may, therefore, leave them in the hands of a receiver appointed by the court. *Very v. Watkins*, 23 How. 469.

2. (Dec., 1872.) . . . The court states at large what is the office and what are the duties of a receiver, giving to them a liberal interpretation in aid of the jurisdiction of the court. It says that in the progress and growth of equity jurisdiction it has become usual to clothe them with much larger powers than were formerly conferred; that in some of the states they are by statute charged with the duty of settling the affairs of certain corporations when insolvent, and are authorized expressly to sue in their own names; and that the court sees no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation without its aid. *Davis v. Gray*, 16 Wall. 203.

3. (Oct., 1876.) Where the subject-matter of litigation is the funds in the possession of a receiver, the court below may, notwithstanding the *supersedeas*, give him the requisite orders for their preservation; but it cannot place them beyond the con-

trol of a decree that may be made here. *Goddard v. Ordway*, 4 Otto, 672.

4. (Nov., 1872.) Where an executor has qualified and given bond for the faithful discharge of his trust, and taken possession of the property of the estate by virtue of the provisions of the will, a strong case must be made against him to induce the court to appoint a receiver to take the possession of the property from him. *Haines v. Carpenter*, 1 Woods, 262.

5. The application for a receiver must be supported by evidence showing that the appointment is necessary. *Ib.*

6. The verification by complainant of a bill, stating, upon information and belief, grounds for the appointment of a receiver, is not of itself such evidence as would justify the appointment by the court. *Ib.*

7. In an application to discharge a trustee, and for the appointment of a receiver for the trust estate, it must be made to appear that the property is in danger, and that the trustee is irresponsible. *Ib.*

8. (July, 1873.) The court will not appoint a receiver of property which is in the possession of a person not a party to the suit. *Searles v. Railroad Co.*, 2 Woods, 621.

9. (Aug., 1855.) Homestead exemption must exist and be claimed at the time the writ comes to the officer's hands. A defendant, by moving upon property thereafter, cannot hold it exempt as a homestead.

A creditor's bill having been filed, and a receiver appointed, the court will direct the assignment of such property to the receiver. *Freeman v. Stewart*, 5 Biss. 19.

10. (Aug., 1860.) After the appointment of a receiver, under a creditors' bill, another creditor can acquire no rights by levying an attachment upon property of the judgment debtor. Where the court has obtained jurisdiction under a creditors' bill, it will protect the creditor in following up his rights. *Perego v. Bonesteel*, 5 Biss. 66.

11. (May, 1878.) The facts essential to the appointment of a receiver need not be pleaded, but may be shown by affidavit at the hearing. *Commercial and Savings Bank v. Corbett*, 5 Sawyer, 172.

12. A prayer for a receiver is unnecessary. *Ib.*

Redemption.

1. (Oct., 1877.) This right of redemption after sale is, therefore, as obligatory on the federal courts sitting in equity as on the state courts; and their rules of practice must be made to conform to the law of the state, so far as may be necessary to give full effect to the right. *Brine v. Insurance Co.*, 6 Otto, 627.

2. (Oct., 1877.) The statute of Minnesota declares that, in the foreclosure of a mortgage by a proceeding in court, the debtor, after the confirmation of the sale, shall be allowed twelve months in which to redeem, by paying the amount bid at the sale, with interest. Where, in a foreclosure suit, a decree, passed by a court of the United States sitting in that state, ordered the master, on making the sale, to deliver to the purchaser a certificate that, unless the mortgaged premises were, within twelve months after the sale, redeemed by payment of the sum bid, with interest, he would be entitled to a deed, and should be let into possession, upon producing the master's deed and a certified copy of the order of the court confirming the report of the sale, — *Held*, that the decree gave substantial effect to the equity of redemption secured by the statute. *Allis v. Insurance Co.*, 7 Otto, 144.

Security for Costs.

1. (Oct., 1846.) A complainant in chancery, residing in another state, but in the same circuit, cannot be required to furnish security for costs, except at the first term. *Foster v. Swasey*, 2 Woodb. & M. 217.

2. (Nov., 1872.) When a suit in equity has been once heard, on issue joined, and is opened for a further hearing, on an amended answer, only as a matter of favor, it is too late to move for security for costs on the ground of the non-residence of the plaintiff, that having appeared on the face of the original bill. *Bliss v. City of Brooklyn*, 10 Blatchf. 217.

3. (Jan., 1875.) A corporation created by the State of New York, and having its principal office in the Southern District of New York, brought a suit in equity in the Circuit Court for the Northern District of New York. On a motion by the defendant that the corporation give security for the costs of the suit, —

Held, that it must give such security. *Lyman Ventilating & Refrigerator Co. v. Southard*, 12 Blatchf. 405.

4. (June, 1879.) On the filing of a bill of review, the equity practice requires the complainant to give security, or deposit a sum of money for satisfying the costs and the damages for delay, if the case is found against him. *Swan v. Wright's Executors*, 3 Woods, 587.

5. But if such a bill is filed without security or deposit, and the defendant allows the case to proceed and costs to accumulate, without objection, he cannot have the bill instantly dismissed on motion. *Ib.*

6. In such case the complainant will, on motion, be ordered to give the security or make the deposit within a day named, and, in default thereof, his bill will be dismissed. *Ib.*

7. (April, 1865.) When litigants in the federal courts are required to give security, their sureties need not be residents of the state in which the suit is pending. *Souter v. La Crosse Railroad*, Woolw. 80.

Set-off, in Equity.

1. (Nov., 1828.) Courts of equity, independently of any statute of set-off, do not exercise jurisdiction to set off mutual disconnected debts, unless where the dealings of the parties imply it as matter of agreement or mutual credit. *Greene v. Darling*, 5 Mason, 201.

2. (Oct., 1837.) Courts of equity, in cases of set-off, follow the law. *Gass v. Stinson*, 3 Sumn. 99.

Solicitor.

1. (Feb., 1859.) A party will not be permitted to substitute a new solicitor in place of one who has had charge of the cause, without the consent of the court. *Sloo v. Law*, 4 Blatchf. 268.

2. Circumstances stated under which the court will give its consent that the solicitor be changed, and order that he deliver up the papers without the payment of his fees. *Ib.*

3. Where, after a party had notified his solicitor, who had faithfully discharged his duties, that his services as solicitor in the cause were no longer wanted, and that his fees for his past

services would not be paid, and had attempted to substitute another solicitor in his place, the solicitor sued out an attachment against the party for his fees, — *Held*, that the bringing of the attachment was no ground for ordering the solicitor to be discharged from the cause without the payment of his fees. *Ib.*

Statute of Frauds.

1. (Oct., 1879.) Where an agreement for the sale of lands, alleged in a bill in equity praying for specific performance, is denied by the answer, the defendant, where there is no written evidence of such agreement, may, at the hearing, insist on the Statute of Frauds as effectually as if it had been pleaded. *May v. Sloan*, 11 Otto, 231.

Striking from Files.

1. (July, 1869.) An answer and cross-bill filed by a person not named in the bill, nor admitted as a defendant, will be stricken from the files. *Putnam v. City of New Albany*, 4 Biss. 366.

Summary Proceedings.

1. (Jan., 1850.) The acts of the legislature [of New York] for the relief of Clarke are private acts. They provide that the Chancellor may act upon them summarily, upon the petition of Clarke, upon which orders are given, as contradistinguished from decrees in suits by bill filed. The last are judgments upon the matters in controversy between the parties before the court. The other are orders in conformity with a legislative act in a particular case. Whatever the Chancellor does in either case, he does as a court of chancery. It will stand when it has been done within the jurisdiction conferred by the private act, until it has been set aside upon motion, as his decrees in suits upon bill filed do until they have been set aside by a bill of review. *Williamson v. Berry*, 8 How. 495.

2. In such a case the court will not deviate from the letter of the act, nor make an order partly founded upon its original jurisdiction and partly upon the statute. It cannot confound its original jurisdiction in a suit with the powers it may be author-

ized to execute by petition, either in a public act giving statutory jurisdiction to the court to be exercised summarily upon petition, or in a private act providing for relief in a particular case, which is to be carried out by the same mode of procedure. *Ib.*

3. Neither orders summarily given upon petition in chancery, nor decrees in suits upon bill filed, can be summarily reviewed as a whole, in a collateral way. *Ib.*

Waiver.

1. (Oct., 1872.) A waiver of an objection, entered on the record of a suit in equity, should also be entered on the record. *American Saddle Co. v. Hogg*, 1 Holmes, 177.

2. (April, 1853.) A defendant in a suit in equity, who appears and answers the bill, cannot, on the hearing, object that the bill contains no prayer for process, or that he was not served with process. *Segee v. Thomas*, 3 Blatchf. 11.

3. (May, 1855.) A defendant who appears and puts in an answer in a suit in equity waives all objections to the regularity of the service upon him of the subpoena to appear and answer. *Goodyear v. Chaffee*, 3 Blatchf. 268.

4. (April, 1869.) Where the answer does not contain such specification [of time, place, and person when, where, and by whom the prior invention was made or known], but only avers general want of novelty, and prior use and sale generally, and the defendant takes testimony before the examiner, to prove such want of novelty, without any objection being at the time interposed by the plaintiff, on the ground that the testimony is directed to a defense not raised by the answer, the plaintiff must be regarded as waiving such objection, and it is too late for him to raise it at the hearing of the cause. *Brown v. Hall*, 6 Blatchf. 401.

5. An objection to testimony made on the taking of it before an examiner must state the ground of the objection, or it is not a legal or valid objection. *Ib.*

6. (July, 1869.) Where a defendant, in a suit in equity for the infringement of a patent, is advised of a decree against him therein, for a perpetual injunction, made on final hearing, and pays in full an execution issued for the taxed costs awarded to the plaintiff by the decree, and neglects for eleven months after making such payment to move to open the decree to let in a

defense, it is too late for him to do so. *Doubleday v. Sherman*, 6 Blatchf. 513.

7. (July, 1878.) In the proofs, W. gave evidence as to prior knowledge and use by him of the thing patented. His name and such fact were not set up in the answer. On the taking of the proofs, the plaintiff objected to such evidence of W. "as incompetent under the rules of the court," and as "incompetent under the laws and rules governing practice in the Circuit Courts of the United States." At the hearing the plaintiff sought to exclude the evidence of W., because his name and the facts of his prior knowledge and use were not set up in the answer. *Held*, that the objection was waived, because it was not distinctly made when the evidence was taken. *Barker v. Stowe*, 15 Blatchf. 49.

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